Supreme Court, U.S.
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In The
Supreme Court of the United States

ROLAND ANTHONY EVANS,

Petitioner,

v.

GENE M. JOHNSON, Director of The Virginia Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Gail A. Ball
Counsel of Record
BALL LEGAL FIRM, P.C.
740 Duke Street, Suite 450
Norfolk, Virginia 23510
(757) 625-2750

Counsel for Petitioner

R. Wayne Nunnally
R. WAYNE NUNNALLY, P.C.
740 Duke Street, Suite 450
Norfolk, Virginia 23510
(757) 625-[illegible]00

Counsel for Petitioner

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTION PRESENTED FOR REVIEW

Was Petitioner's Sixth Amendment Right to a fair trial by an impartial jury violated where one of the petitioner's jurors met with a member of petitioner's family outside the courthouse during a recess of petitioner's trial and was told that the petitioner was "slick" and deserved at least 30 years in prison and, in response, the juror inquired of the family member which trial the family member was in and was told that it was the petitioner's trial?

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DECISIONS BELOW

The United States Court of Appeals for the Fourth Circuit issued a mandate on January 31, 2008, for the judgment entered on December 4, 2007, reprinted at App. 1a. The decision of the United States District Court for the Fourth Circuit, Norfolk Division, is reprinted at App. 3a. The Report and Recommendation of the United States Magistrate Judge's Report and Recommendation filed July 31, 2007, is reprinted at App. 7a.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2007. App. 3a. The court denied *en banc* review on January 23, 2008, App. 62a, mandated the judgment entered December 4, 2007 to take effect on January 31, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment, made applicable to the states by the due process clause of the Fourteenth Amendment, guarantees every defendant the right to an impartial jury. The Virginia Constitution, Article I, Bill of Rights, Section 8, provides that in criminal prosecutions a man has a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to have a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty.

I. STATEMENT OF THE CASE

This petition seeks review of a decision by the United States Court of Appeals for the Fourth Circuit to deny a certificate of appealability and to dismiss the appeal in this case of the petitioner's motion for a new trial based on manifest juror misconduct which could have delivered an improperly tainted verdict since the test in a criminal case is not whether the jurors were actually prejudiced by the extraneous matter but whether they might have been so prejudiced. If they might have been prejudiced, then the purity of the verdict is open to serious doubt, and the verdict should be set aside and a new trial awarded. Hinton v. Gallagher, 190 Va. 421, 57 S.E.2d 131 (1950).

A. Background

Petitioner's three-day trial commenced on June 25, 2001, and concluded on June 27, 2001. Petitioner, Roland Evans ("Evans"), was convicted by a jury in the Circuit Court of the City of Alexandria ("Circuit Court") of rape, forcible sodomy, abduction with intend to defile, and assault and battery (Case No. DF-010186).

Subsequent to the trial testimony on June 27, 2001, the jury retired to deliberate the verdict and the court was in recess. During that recess the defendant's counsel and the prosecuting counsel were informed by petitioner's aunt, Jillinda Glenn, that there may have been juror misconduct. App. 63a, Affidavit of Jillinda Glenn. Neither one of counsel informed the court immediately upon being

given this information, but waited to inform the judge to the fact that there may be a problem with a juror until after the jury had reconvened in the courtroom and after they had determined the guilt phase, the sentencing phase, and the judge had dismissed the jury to leave. Trial transcript pp. 101-102.

THE COURT: All right. Ladies and gentlemen of the jury, it's been a long three days for you, you've done a lot of very serious hard work. The Court does appreciate not only your attendance and your diligence in this matter, but for your ability to be sustaining through this time in this trial.

You are now all free to go, however, and you may - - I don't know whether I'll see you any more again, I'm visiting here, your fair city, but perhaps I'll see you back again some time somewhere. You are all free to go.

MR. LEIPIG: Judge, I'm very sorry, can I approach please and Ms. Pollard.

THE COURT: Yes, you certainly may. Hold on, don't go anywhere yet.

(BENCH CONFERENCE.)

THE COURT: All right, ladies and gentlemen of the jury, you are free to go. Thank you so much. [No poll of the entire jury was conducted at this time nor was one held subsequent to this time. No motion was made by counsel to poll the jury. "To assure fairness of trial, a motion to poll the jury should be

granted, and it is error for the trial court to refuse that motion...It is the jury's decision that determines the fate of the accused and that decision must be free of doubt. Usually, that could only have been assured by a poll." Witt v. Com., 15 Va. App. 215, 422 S.E.2d 465 (1992).]

(THE JURY LEFT THE COURTROOM.)

[The Court called Juror Haley before him.]

THE COURT: Thank you very much for remaining. There was some possibility that you may have overheard something, you remember during the course of the trial I instructed the jury members not to discuss the case or standing within the hearing of anyone discussing it. And I was wondering, if during the course of the last three days whether you overheard anything or discussed anything with anybody?

JUROR: Never discussed it with anybody but just some guy came outside and said that he had a - - at trial. And I said what trial are you in? And he said the Evans trial. That's it, and walked away. (Emphasis added.)

THE COURT: That's it?

JUROR: That's it.

THE COURT: Did you hear anything?

JUROR: No.

THE COURT: You're free to go. Thank you so much. Any motions?

MS. POLLARD: No, your Honor.

MS. LEIBIG: No.

THE COURT: All right. I'm going to order a pre-sentence investigation report, August 23, 2001 at 10 a.m.

Court was adjourned.

It is the position of the petitioner in this case before the Court that when Juror Haley asked "what trial are you in?" and received the answer, "the Evans trial," it became an actual discussion. Later the contents of the complete exchange were revealed and it was obvious that the subject matter discussed was germane to the essence of the trial in progress at the time.

The discussion between Juror Haley and Uncle Gaster Hunter (who described himself as the uncle of the defendant Evans) took place on a lunch recess on the second day of the three-day trial in front of the courthouse. "In a criminal case, strangers would not be permitted to make comments to the jury about the defendant in the courtroom; it is no less offensive to allow such comments to be made in the juror's presence on the courthouse lawn." Near v. Cunningham, 313 F.2d 929 (4th Cir. 1963), commented on in 21 Wash. & Lee L. Rev. 346 (1964). App. 73a, Affidavit of Juror Haley; App.71a, Affidavit of Uncle Gaster Hunter; App. 66a, Affidavit

of Investigator Clarence E. Nelson; App. 75a, Report of Investigator Heidi Tseu.

On October 4, 2001, the sentencing hearing was conducted. Before pronouncing the sentence, the Circuit Court heard argument on Evans' motion for a new trial in which juror misconduct was alleged based on certain conversations that occurred between a relative of Evans and a member of the jury panel. The Circuit Court declined defendant's motion to hold a proper evidentiary hearing to further investigate the allegations, and after hearing arguments, the court denied the motion for a new trial after which Evans' sentence was pronounced.

Juror Haley provided written and witnesses "affidavits" for the Public Defender's office by Mr. Nelson, and one for the prosecutor's office. Each of these differ in content.

Within the affidavit of Investigator Clarence E. Nelson, App. 66a, Mr. Nelson gives an account of his investigation of Juror Haley as well as with Uncle Gaster with dates. In the affidavit Mr. Nelson chronicled his three visits to Juror Haley's home: June 29, 2001, (initial visit, spoke to Mr. Haley's wife, set up future appointment with Mr. Haley); July 2, 2001, (conducted an interview in his living room); and July 20, 2001, (with a typed affidavit with the information that Mr. Haley had provided on his previous visit, conducted proper protocol, Mr. Haley willingly signed it.)

The transcript of the October 4, 2001, sentencing hearing does not include any testimony

at all of Juror Haley. Yet the court made the following statement which indicates that the court may have had improper contact with the juror. October 4, 2001, Sentencing transcript, pp. 14, 15.

> THE COURT: Well Mr. Haley, the juror matter did say that the statement was already written out, typed, when he came to see Mr. Haley in the first place. He also implied that Mr. Nelson that came to see him was from the Commonwealth Attorney's office rather than the Public Defender's office. He did imply those things but I do not find that any of those rise to the level of fraud in the matter. Maybe over-zealous perhaps but to put this to rest, I asked the juror about this particular event and he told me what it was and he signed an Affidavit on his own, the last one I might say, which qualifies the question to my satisfaction that the things that were said and the statements submitted by the Public Defender's officer were incorrect.

No where in the record do we find where this exchange with the court and the juror took place. That being the case, it would appear that it was a private exchange between the juror and the court concerning an ongoing controversy, which, on the face of it, seems highly improper.

On the basis of what appears to be an *ex parte* communication with Mr. Haley, off the record and with no opportunity for cross examination, the court accepted Mr. Haley's word that there was only one

contact with Investigator Nelson and was handed a typed paper which he did not read, did not understand, and yet he signed it. The court then proceeded to state on the record "that the things that were said and the statements submitted by the Public Defender's office were incorrect."

"As a general rule, all communications between the trial judge and the jury, after the submission of the case must take place in open court and in the presence of or after notice to the parties or their counsel." Klesser v. Stone, 201 S.E.2d 269 (W. Va. 1973). In addition, Section 19.2-263.1, Code of Virginia (1950) "prohibits contact between a judge and juror in a criminal proceeding outside the presence of the parties or their counsel."

On October 26, 2001, Evans filed the petition for appeal in the Court of Appeals which the court granted by order entered on May 7, 2002. Record No. 2893-01-4.

On November 26, 2002, the Court of Appeals reversed the Circuit Court's ruling and remanded the case for an evidentiary hearing. App. 61a. This case is published as Evans v. Commonwealth, 572 S.E.2d 481, 39 Va. App. 229 (2002). App. 48a.

On December 30, 2002, the Circuit Court conducted the evidentiary hearing upon remand of the case, and again denied Evans' motion for a new trial.

On January 13, 2003, Evans again noted his intent to appeal to the Court of Appeals; he filed the

petition for appeal on May 2, 2003, which appeal was denied by order entered August 20, 2003. App. 40a.

On January 9, 2004, Evans filed his petition for appeal in the Supreme Court of Virginia. On July 8, 2004, the Supreme Court of Virginia refused the petition for appeal.

On July 7, 2005, Evans executed a *pro se* petition for writ of habeas corpus in the Circuit Court which was denied by the Circuit Court by order entered May 11, 2006. Case No. CL05001347.

On August 1, 2006, Evans executed a *pro se* petition for appeal of that decision in the Supreme Court of Virginia. On December 11, 2006, the Supreme Court of Virginia refused the petition, finding no reversible error. Record No. 061668.

On December 30, 2006, while in the custody of the Virginia Department of Corrections, Evans executed the instant *pro se* federal petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On January 12, 2007, the instant petition was filed in the United States District Court for the Eastern District of Virginia, Norfolk ("District Court").

On February 16, 2007, Respondent filed his Rule 5 Answer and Motion to Dismiss, accompanied by a supporting brief ("Respondent's Brief"), and a Notice of Motion Pursuant to Local Rule 7 (K).

On March 9, 2007, the court received from Evans what would be the "Petitioner's Reply Brief."

On July 31, 2007, the United States Magistrate Judge's Report and Recommendation for The United States District Court For the Eastern District of Virginia was entered. Reprinted App. 7a.

On August 28, 2007, Final Order of the District Court was entered to adopt and approve the findings and recommendations set forth in the report of the U.S. Magistrate Judge and, therefore, ordered that the petition be denied and dismissed with prejudice as the claims are procedurally barred before the court. Reprinted App. 4a.

On December 4, 2007, Order denying a certificate of appealability and dismissing the appeal, with opinion, The United States Court of Appeals For the Fourth Circuit issued its judgment and denied a certificate of appealability and dismissed the appeal. App. 3a.

On January 23, 2008, The United States Court of Appeals For the Fourth Circuit denied the petition for rehearing and rehearing en banc. App. 62a.

On January 31, 2008, The United States Court of Appeals For the Fourth Circuit Mandate issued that Judgment entered on December 4, 2008, to take effect the date of January 31, 2008.

B. Grounds Alleged

Evans asserts in this Court that he is entitled to relief under 28 U.S.C. § 2254 for the reason stated as follows:

Evans' constitutional rights to a fair trial by an impartial jury were violated when a juror (Mose Haley) was told negative and prejudicial comments by a private communication with a disgruntled family member (Gaster Hunter) during a recess of the trial in the second day of testimony in a three day trial.

This claim was raised on direct appeal, denied by the Circuit Court initially and following the evidentiary hearing upon remand, by the Court of Appeals, and finally by the Supreme Court of Virginia.

On December 30, 2002, in the remanded evidentiary hearing the circuit court judge found the following which are recorded in the transcript of that hearing on page 166, 117.

> And the Court, having heard the testimony of the parties and observed them, and reviewed the evidence in the matter, and I've considered your arguments as well. The Court finds that the comments that were made in this case were really- - by Mr. Hunter were that the - - it's his opinion that the Defendant, Mr. Evans, was slick, and that he hoped he got a long sentence.

That is the evidence that the Court finds was fold. The Court rules that that - - there was no mention of his - - the nephew always being in trouble, that he had been in this kind of trouble before, and the Court finds that that was not told to Mr. Haley. The only evidence that Mr. Haley received was the information I just stated.

There is nothing - - of course, there was nothing mentioned about the trial at all, no facts or determinations involving any of the evidence. None of that was mentioned.

There is no evidence at all that any of the jurors were influenced by the testimony that Mr. Haley did overhear. The question, really, boils down to is whether or not the fact that someone told Mr. Haley, a juror that the Defendant was slick and should get a large sentence, whether that, in itself, is sufficient to justify the Court finding that a new trial should be granted in this matter.

Mr. Haley has affirmatively stated that that information did not affect his judgment in this case whatsoever, and he did not relay it to any of the jurors in the case either.

And I find and rule that, based on that information, that the juror was not prejudiced, and the jury was not prejudiced, and your motion is denied.

> And the Court notes your exception to the Court's ruling.

The petitioner before this Court expresses his opinion on the above convoluted ruling as sounding like the court is "circling the wagons" in order to avoid having to declare a mistrial of a three-day trial and grant the petitioner's motion for a new trial. This ruling is contrary to sound judgment and to all of the cited case law in this petition. Of course, at the very minimum court finding that Juror Haley only heard that the defendant "was slick" and that the gentleman who was speaking to him knew the defendant well enough to say he "hoped the defendant got a long sentence" those two statements were highly prejudicial on the face of them. Never mind the overwhelming credible evidence presented that Juror Haley actually received additional damning information from Uncle Gaster.

In Stockton v. Virginia, 852 F.2d 740 (4th Cir. 1988), a comment by restaurant proprietor to members of capital murder jury that "they ought to fry the son-of-a-bitch" while they were at lunch was prejudicial to the capital murder defendant. Certainly, Uncle Gaster's remark that he hoped the jury would give him a long sentence (30 years) would be comparable to comments in the Stockton case.

At this sentencing hearing the court heard from three other jurors who claimed that Juror Haley did not say anything to them about the conversation with Uncle Gaster. Where were the remaining eight jurors?

In Scott v. Comm., 11 Va. App. 516, 399 S.E.2d 648 (1990), the mere fact that three of the twelve jurors said they were not influenced in their deliberations was not sufficient to establish harmless error.

In this Court's case before it, the circuit court judge determined that the other eight jurors who did not come to the evidentiary hearing were not influenced by the misconduct of the juror.

Petitioner would ask the Court for a full review of the affidavit(s) in this case because the circuit court judge abandoned sound discretion and rejected this signed statement sworn by Investigator Nelson, App. 66a, a highly credentialed professional. The court suggested Nelson was biased in favor of the defendant since Nelson was an investigator for the Public Defender's office. Tr. tr. October 4, 2001, sentencing transcript, pp. 14, 15.

Again, this above stated claim of a constitutional violation caused by juror misconduct was also presented in his State Habeas Petition, which was denied by the Circuit Court and by the Supreme Court of Virginia on appeal.

II. FINDING OF FACT AND CONCLUSIONS OF LAW

The District Court found that each of Evan's claims were exhausted and procedurally defaulted for purposes of federal habeas review. Therefore, the District Court declined to address the instant claim of juror misconduct on the merits.

Exhaustion and Procedural Default

As far as the claim here raised before this Court of juror misconduct is concerned, the record would indicate that this claim has made its way through the courts in appeal and in a habeas action and therefore should have been addressed on the merits by the District Court.

The District Court cited O'Sullivan v. Boerckel, 526 U.S. 838, 844, 845 (1999) which states that if a claim has been addressed by the state's highest court on either direct or collateral review, it is exhausted. This Court's petitioner has given the state courts full opportunity to resolve any constitutional issues by invoking two complete rounds of the State's established appellate review processes. Therefore, the petitioner's burden to prove that his claims have been exhausted have been satisfied as evidenced by the record.

It was incumbent upon the District Court to have addressed the claim of juror misconduct on the merits.

III. FINDING OF DISTRICT COURT

The District Court FOUND that the claim petitioner raised in his District Court's petition were procedurally barred before the District Court and denied Evans' petition with respect to all claims presented to that court including the claim of juror misconduct and Evans' claims were DISMISSED WITH PREJUDICE. The District Court did not issue a Certificate of Appealability to petitioner.

IV. FINDING OF UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Court of Appeals ("4th Cir. Court of Appeals") denied issuance of a certificate of appealability and dismissed the appeal. That court reviewed the record and concluded without oral argument and that Evans had not made the requisite showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2) (2000). However, it is noted in the footnote on page 2 of the December 4, 2007 opinion the following:

Because Evans properly raised his allegations of juror misconduct on direct appeal, the district court's ruling that this claim was procedurally defaulted is debatable or wrong. Nevertheless, we decline to issue a certificate of appealability as to this issue because our review of the record leaves no uncertainty that the state court denial of this claim did not result in a decision contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1) (2000).

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE NUMEROUS RULINGS IN THE FOURTH CIRCUIT AND THE HIGHEST COURTS OF NUMEROUS STATES.

Referring to Michie's Jurisprudence, Jury § 54, Communications with Jury--*Conversation with Outside Parties*, in part, it states:

A. Private communications, possibly prejudicial, between jurors and third persons are absolutely forbidden and invalidate the verdict, unless their harmlessness is made to appear. Gray v. Hutto, 648 F.2d 210 (4th Cir. 1981).

B. Casual conversation with a witness upon a matter not related to the case is not ground for reversal, however. On the other hand, if the jurors, or any of them, listen to a statement (not argument of counsel) of a person made to them about a material matter in the trial of the case when such person is not on the witness stand, the conduct is improper and violates the rule against hearsay. Yearly v. Holbrook, 171 Va. 266, 198 S.E. 441 (1938).

C. In a criminal case, strangers would not be permitted to make comments to the jury about the defendant in the courtroom; it is no less offensive to allow such comments to be made in the jurors' presence on the courthouse lawn. Near v. Cunningham, 313 F.2d 929 (4th Cir. 1963), commented on in 21 Wash. & Lee L. Rev. 346 (1964).

D. One essential concept of a fair trial is that no outside influence shall be brought to bear upon the jury and that no evidence shall be considered by them other than that presented and admitted on the trial of the case. Hinton v. Gallagher, 190 Va. 421, 57 S.E.2d 131 (1950). The test in a criminal case is not whether the jurors were actually prejudiced by the extraneous matter but whether they might have been so prejudiced. If they might have been prejudiced, then the purity of the verdict is open to serious doubt, and the verdict should be set aside

and a new trial awarded. To assure fairness of trial, a motion to poll the jury should be granted, and it is error for the trial court to refuse that motion....It is the jury's decision that determines the fate of the accused and that decision must be free of doubt. Usually, that could only have been assured by a poll. Witt v. Com., 15 Va. App. 215, 422 S.E.2d 465 (1992).

E. Communications relative to a case on trial between jurors and third persons, witnesses or the officer in charge of the jury, are absolutely forbidden, and, if it appears that such communications have taken place, a presumption arises that they were prejudicial, but this presumption may be rebutted by evidence showing the communications to have been harmless. Under West Virginia law outside communications by the jurors raise a presumption in favor of the prisoner, which the state must overcome by evidence beyond a reasonable doubt. McKinney v. Boles, 254 F. Supp. 433 (N.D.W. Va. 1966).

1. Comment by restaurant proprietor to members of capital murder jury that "they ought to fry the son-of-a-bitch" while they were at lunch was prejudicial to the capital murder defendant. Stockton v. Virginia, 852 F.2d 740 (4th Cir. 1988)

2. The defendant's right to an impartial jury requires that the government bear the burden of establishing the nonprejudicial character of any outside contact. Scott v. Comm., 11 Va. App. 516, 399 S.E.2d 648 (1990).

3. The test in a criminal case is not whether the jurors were actually prejudiced by the communication, but whether they might have been so prejudiced. If they might have been prejudiced, then the purity of the verdict is open to serious doubt and the verdict should be set aside and a new trial awarded. Scott v. Com., 11 Va. App. 516, 399 S.E.2d 648 (1990).

4. The mere fact that three of the twelve jurors said they were not influenced in their deliberations was not sufficient to establish harmless error. Scott v. Comm., 11 Va. App. 516, 399 S.E.2d 648 (1990).

5. Any private communication, contact or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. Write v. Angelone, 151 F.3d 151 (4th Cir. 1998).

F. In cases where it is alleged that an unauthorized, extra-judicial contact or communication with a juror occurred during trial, the trial court has the duty to investigate the allegation and determine whether there may have been a violation of the right to trial by an impartial jury. An evidentiary hearing should be held, and the initial investigation should address the competency of the evidence being offered to impeach the verdict. If the evidence consists of a juror affidavit, it must be determines whether the affidavit relates solely to the conduct of a nonjuror or extraneous influence

upon the juror or jury without reference to any phase of the deliberative process. When there is evidence that extraneous prejudicial information was improperly brought to the Jury's attention or that some outside influence was improperly brought to bear upon any juror, the Federal Rules of Evidence permit the juror to testify as to these matters. Generally, if it is determined that the affidavit is competent evidence, a strong presumption of prejudice automatically arises for the party opposing the verdict. At this point, it would not be necessary for the moving party to call the affiant to testify about the communications or influence. The party supporting the verdict will bear the heavy burden of rebutting this presumption, and will be limited to producing evidence which shows that the unauthorized communication was harmless without going behind the verdict and into the jurors' mental processes. The trial court will necessarily be compelled to consider the inferences which may be drawn from the evidence offered to impeach the verdict and to make legal conclusions based on the presumptions and burdens arising from the evidence. If the court finds that there remains a reasonable possibility that the jury's verdict was influenced by the communication or material that improperly came before it, then the burden of proving that the jury communication was nonprejudicial has not been met and the court should order a new trial. Herring v. Blankenship, 662 F. Supp. 557 (W.D. Va. 1987). The party attacking a jury verdict on the grounds of improper communication with a juror bears the initial burden of introducing competent evidence that there were extrajudicial communications or contacts and that

they were more than innocuous interventions. United States v. Lawhorne, 29 F. Supp. 2d 292 (E.D. Va. 1998).

G. As a general rule, all communications between the trial judge and the jury, after the submission of the case must take place in open court and in the presence of or after notice to the parties or their counsel. Klesser v. Stone, 201 S.E.2d 269 (W. Va. 1973).

Section 19.2-263.1, Code of Virginia (1950) prohibits contact between a judge and juror in a criminal proceeding outside the presence of the parties or their counsel.

II. THE DECISION BELOW IS WRONG IN THE FOLLOWING RESPECTS.

A. THE RIGHT TO A FAIR TRIAL AND AN IMPARTIAL JURY IS PROTECTED BY THE SIXTH AMENDMENT AND FUNDAMENTAL TO THE RULE OF LAW AND JUSTICE.

B. THE CIRCUIT COURT WAS THE ONLY COURT TO EXAMINE THE EVIDENCE ON THE MERITS. THIS CIRCUIT COURT INITIALLY DENIED THE PETITIONER'S MOTION FOR AN EVIDENTIARY HEARING ON THE ISSUE OF JUROR MISCONDUCT. WHEN THE COURT OF APPEALS OVERTURNED THE CIRCUIT COURT'S DECISION AND REMANDED THE CASE BACK TO IT FOR

THE EVIDENTIARY HEARING, THE CIRCUIT COURT RECITED THE SAME FLAWED OPINIONS AS IT HAD PREVIOUSLY AND DISAGREED AND DISCOUNTED THE FINDINGS AND OPINIONS OF THE COURT OF APPEALS UPON REMAND.

C. THE PETITIONER ONCE AGAIN APPEALED THAT CIRCUIT COURT'S DECISION TO THE COURT OF APPEALS OF VIRGINIA AND IT CAPITULATED TO THE CIRCUIT COURT'S DECISION INSTEAD OF EXAMINING THE EVIDENCE ON THE MERITS. SOMETIMES, IN CERTAIN CASES THE FINDER OF FACT IS CLEARLY WRONG IN ITS JUDGMENT AND UPON SERIOUS REVIEW SHOULD BE OVERTURNED IN THE INTEREST OF JUSTICE.

CONCLUSION

For the reasons stated, the Court should grant the petition for writ of certiorari in order to provide petitioner with his sixth amendment constitutional right to be tried by an impartial jury.

Appendix

[ENTERED: DECEMBER 4, 2007]

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-7438

ROLAND EVANS,

Petitioner – Appellant,

versus

GENE M. JOHNSON, Director of the Virginia Department of Corrections,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Walter D. Kelley, Jr., District Judge. (2:07-cv-00025-WDK)

Submitted: November 21, 2007
Decided: December 4, 2007

Before TRAXLER, SHEDD, and DUNCAN, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Gail Avery Ball, BALL LEGAL FIRM, PC, Norfolk, Virginia, for Appellant. Jonathan Mark Larcomb, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Roland Evans seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2254 (2000) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2000). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). We have independently reviewed the record and conclude that Evans has not made the requisite showing.* Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

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* Because Evans properly raised his allegations of juror misconduct on direct appeal, the district court's ruling that this claim was procedurally defaulted is debatable or wrong. Nevertheless, we decline to issue a certificate of appealability as to this issue because our review of the record leaves no uncertainty that the state court denial of this claim did not result in a decision contrary to, or an unreasonable application of, clearly established federal law. See 28 U.S.C. § 2254(d)(1) (2000).

[ENTERED: DECEMBER 4, 2007]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-7438
(2:07-cv-00025-WDK)

ROLAND EVANS,
Petitioner – Appellant,

v.

GENE M. JOHNSON, Director of the Virginia Department of Corrections,
Respondent – Appellee.

JUDGMENT

In accordance with the decision of this Court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/Patricia S. Connor, Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

ROLAND EVANS, #3 00605,
Petitioner,

v. ACTION NO. 2:07cv25

GENE M. JOHNSON, Director of the Virginia Department of Corrections,
Respondent.

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. The petition alleges violation of federal rights pertaining to Petitioner's conviction on June 27, 2001, in the Circuit Court of the City of Alexandria, Virginia, for rape, forcible sodomy, abduction with intent to defile, and assault and battery. Petitioner was sentenced to serve a total of thirty (30) years and six (6) months (five (5) years for each of the rape and forcible sodomy charges, twenty (20) years for the abduction with the intent to defile charge, and six (6) months for the assault and battery charge), with three (3) years suspended (one (1) year for each of the rape, forcible sodomy and abduction with the intent to defile charges), for a total active sentence of twenty-seven (27) years and six (6) months.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(l)(B) and (C), Rule 72(b) of the

Federal Rules of Civil Procedure and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. The report of the Magistrate Judge was filed on July 31, 2007, denying Petitioner's motion for an evidentiary hearing as well as his motion for the appointment of counsel and recommending dismissal of the petition. By copy of the report, each party was advised of his right to file written objections to the findings and recommendations made by the magistrate judge. On August 9, 2007, the Court received Petitioner's Motion for Stay of Proceedings (Document No. 10) and Petition for Re-Hearing With a Suggestion For Rehearing en banc [sic] (Document Mo. 11), which the Court construes as Petitioner's objections to the Magistrate Judge's Report and Recommendation filed on July 31, 2007. The Court received no response from Respondent.

The Court, having reviewed the record and examined the objections filed by Petitioner to the Magistrate Judge's report, and having made de novo findings with respect to the portions objected to, does hereby ADOPT AND APPROVE the findings and recommendations set forth in the report of the United States Magistrate Judge filed on July 31, 20 07, and it is, therefore, ORDERED that the petition be DENIED AND DISMISSED WITH PREJUDICE as the claims are procedurally barred before this Court. It is further ORDERED that judgment be entered in favor of Respondent.

Further, insofar as the Court construed Petitioner's Petition for Re-Hearing With a

Suggestion For Rehearing en banc [sic] as Petitioner's objections to the Magistrate Judge's Report and Recommendation, which the Court has considered in conjunction with entry of the instant Final Order, Petitioner's Motion for Stay of Proceedings is hereby DENIED as MOOT.

Petitioner may appeal from the judgment entered pursuant to this final order by filing a written notice of appeal with the Clerk of this Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within thirty (30) days from the date of entry of such judgment. Petitioner has failed to demonstrate "a substantial showing of the denial of a constitutional right." Therefore, the Court, pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, declines to issue a certificate of appealability. See Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003).

The Clerk shall mail a copy of this Final Order to Petitioner and to counsel of record for Respondent.

/s/
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
August 28, 2007

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

ROLAND EVANS, #300605,
Petitioner,

v. CIVIL ACTION NO. 2:07cv25

GENE M. JOHNSON, Director of the
Virginia Department of Corrections,
Respondent.

UNITED STATES MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. The matter was referred to the undersigned United States Magistrate Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C), Rule 72(b) of the Federal Rules of Civil Procedure, and Rule 72 of the Local Civil Rules of the United States District Court for the Eastern District of Virginia. For the reasons stated herein, the Court recommends that the instant petition for a writ of habeas corpus be DENIED.

I. STATEMENT OF THE CASE

A. Background

On June 27, 2001, Petitioner, Roland Evans ("Evans"), was convicted by a jury in the Circuit Court of the City of Alexandria ("Circuit Court") of rape, forcible sodomy, abduction with intend to

defile, and assault and battery (Case No. CF-010186).[1]. Following a sentencing hearing on October 4, 2001, Evans was sentenced to a total of thirty (30) years and six (6) months (five (5) years for each of the rape and forcible sodomy charges, twenty (20) years for the abduction with the intent to defile charge, and six (6) months for the assault and battery charge), with three (3) years suspended (one (1) year from each of the rape, forcible sodomy and abduction with the intent to defile charges), for a total active sentence of twenty-seven (27) years and six (6) months, as reflected in the court's sentencing order entered October 10, 2001.

Before pronouncing the sentence, the Circuit Court heard argument on Evans' motion for a new trial, in which juror misconduct was alleged based on certain conversations that occurred between a relative of Evans and a member of the jury panel. See Hearing Transcript, October 4, 2001, at 4 (attached as Exhibit 2 to Respondent's Brief in Support of Rule 5 Answer and Motion to Dismiss). The Circuit Court declined to hold an evidentiary hearing to further investigate the allegations, and, after hearing arguments, denied the motion for a new trial, id. at 15-16, after which Evans' sentence was pronounced.

On October 26, 2001, Evans noted his intent to appeal to the Court of Appeals of Virginia ("Court

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[1] Evans was represented at trial by Christopher Leibig, Esq. ("Attorney Leibig") and Paul Pepper, Esq. ("Attorney Pepper"), and at the subsequent sentencing hearing and on direct appeal by James C. Clark, Esq. ("Attorney Clark")

of Appeals"). Thereafter, on February 22, 2002, Evans filed the petition for appeal in the Court of Appeals ("First State Petition for Appeal").[2] The

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[2] The Court of Appeals granted Evans an extension of time to perfect the appeal. In his petition, Evans raised the following grounds for appeal: (1) The trial court erred in denying his motion for a new trial based upon alleged juror misconduct; and (2) The trial court erred in sustaining the Commonwealth's objection to the testimony of Evans' Aunt regarding a statement allegedly made by Evans as they were passing the exit to the victim's apartment two (2) days prior to the alleged crimes and that was offered by the defense to show Evans' state of mind concerning a debt owed to him by the victim.

[3] As to the first appellate issue, the Court of Appeals held that the record was insufficient to determine whether the trial judge erred in sustaining the Commonwealth's objection to the witness' testimony because the record did not reflect a proffer of that testimony. Evans II, at 236. As such, the court declined to consider the error assigned to the rejection of that testimony. Id. (citing Whittaker v. Commonwealth, 217 Va. 966, 968-69 (1977) (appellate court has no basis to rule upon testimony that is rejected at trial before it is delivered absent a "proper proffer")).

As to the second appellate issue, the Court of Appeals held that the trial judge made a premature credibility finding on the issue of juror misconduct, "without first conducting an adequate investigation upon evidence properly presented at a hearing." Id. at 240. The Court of Appeals' recitation of the facts indicated that after the trial judge dismissed the jurors at the end of the trial, he questioned one juror, Mose Haley ("Juror Haley"), to ask if he had discussed the case with anyone during the trial. Id. at 233. Juror Haley denied that he had discussed the case with anyone, but he did recall a conversation with a man – later identified as Evans' Uncle, Gaster Hunter ("Hunter") – who stated he was there for "the Evans trial," whereupon Juror Haley stated he immediately walked away from the man. Id. Weeks later, at the sentencing hearing, Evans filed a motion for a new trial, to which was attached a

Court of Appeals granted the petition and awarded Evans an appeal, by order entered on May 7, 2002. Record No. 2893-01-4 ("Evans I"). On November 26, 2002, upon consideration of the parties' briefs and oral argument, the Court of Appeals reversed the Circuit Court's ruling and remanded the case for an evidentiary hearing.[3] Evans v. Commonwealth, 39 Va. App. 229 (2002) ("Evans II"). On December 30, 2002, the Circuit Court conducted the evidentiary

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document purporting to be an "affidavit" signed by Juror Haley ("Juror Haley's First Affidavit"). Id. at 233-34. That document was "witnessed by" C.E. Nelson ("Nelson"), an investigator from the Public Defendant's Office. Id. at 234. In response, the Commonwealth offered another document purporting to be an affidavit from Juror Haley ("Juror Haley's Second Affidavit"), which was "witnessed by" a police detective. Id. at 234-35. The trial court denied Evans' request for an evidentiary hearing and heard arguments on the motion for a new trial, which was denied. Id. at 235. In so doing, the trial court relied upon the oral statements made by Juror Haley and the statements in Juror Haley's Second Affidavit, which the trial court found "were correct," to determine that there were no other conversations between Juror Haley and Hunter. Id. The trial court further found the facts in Juror Haley's First Affidavit were insufficient to warrant the grant of a new trial even if "these facts are correct." Id. The trial court also accepted as a proffer of evidence a sworn, three-page affidavit from Nelson (the "Nelson Affidavit"), describing the events involved in securing Juror Haley's First Affidavit. Id. The Court of Appeals noted that the Nelson Affidavit "contradicted in significant part" the other statements by Juror Haley. Id.

The case was remanded "for an evidentiary hearing and for a determination on proper evidence whether sufficient misconduct occurred to warrant setting aside of the jury verdict 'and for such proceedings thereafter as may be necessary and proper.'" Id. at 240 (quoting Kearns v. Hall, 197 Va. 736, 745 (1956)).

hearing upon remand of the case, and again denied Evans' motion for a new trial.

On January 13, 2003, Evans again noted his intent to appeal to the Court of Appeals; he filed the petition for appeal on May 2, 2003 ("Second State Petition for Appeal").[4] The Court of Appeals denied Evans' petition for appeal by order entered on August 20, 2003.[5] Record No. 0123-03-4 ("Evans

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[4] In his petition, Evans raised only a single ground forappeal, namely, that the trial court erred in denying his motion for a new trial based upon alleged juror misconduct.

[5] The Court of Appeals rejected the appeal on the merits, giving deference to the trial judge's credibility determinations from the evidentiary hearing and determining the trial court did not abuse its discretion in denying the motion for a new trial. Evans III, at 6-7 (citing Sandoval v. Commonwealth, 20 Va. App. 133, 138 (1995) (determination of witness credibility and weight accorded to evidence are matters solely for finder of fact)). The Court of Appeals noted that the Circuit Court specifically found that "the only information Hunter imparted to Juror Haley was that Evans was 'slick' and that Hunter hoped he would get a long sentence." Id. at 6. Juror Haley further testified that the comments made by Hunter did not affect his opinion of Evans or his decision as a juror in that case. Id. at 4. The Circuit Court accepted that testimony, but specifically rejected testimony that Hunter had mentioned to Juror Haley that Evans had previously been in trouble of the same kind. Id. at 6. Ultimately, the Circuit Court concluded that the statements allegedly made to Juror Haley, which were not heard by other jurors, had not prejudiced Juror Haley and did not warrant a new trial. Id. The Court of Appeals accepted this ruling, finding that Hunter did not provide Juror Haley with any information not otherwise introduced as evidence at trial, that Hunter did not comment to Juror Haley on the evidence adduced at trial against Evans, and that neither Juror Haley nor any of the other jurors were affected in their deliberations by Juror Haley's encounter with Hunter. Id. at 6-7.

III"). By order entered December 22, 2004, the Court of Appeals also summarily rejected Evans' August 29, 2003 petition for review by a three-judge panel. Record No. 0123-03-4 ("Evans IV").

On January 9, 2004, Evans filed his petition for appeal in the Supreme Court of Virginia ("Third State Petition for Appeal").[6] On July 8, 2004, the Supreme Court of Virginia summarily refused the petition for appeal. Record No. 040054 ("Evans V"). Evans did not file a petition for certiorari in the United States Supreme Court.

On July 7, 2005,[7] Evans executed a pro se petition for a writ of habeas corpus in the Circuit Court ("State Habeas Petition"),[8] which was denied

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[6] In that petition, Evans raised the same ground for appeal as was raised in the Court of Appeals in the Second State Petition for Appeal, see supra note 4.

[7] The petition appears to have been executed on July 7, 2005, but it was not stamped as filed by the court until July 12, 2005. The Court notes that a Virginia Supreme Court Special Rule, effective September 1, 2004, recognizes a prison mailbox rule for inmate filings in the Virginia trial courts: a paper is timely filed by an inmate when "deposited in the institution's internal mail system with first-class postage prepaid on or before the last day of filing." Va. Sup. Ct. R. 3A:25. In the absence of evidence to the contrary, the Court has applied this rule in considering the State Habeas Petition as filed, for statute of limitations purposes, on the date of execution, July 7, 2005.

[8] In that petition, Evans raised the following grounds:

(A) Trial court errors:

(1) The trial court erred in finding, after a suppression hearing, that Evans' Miranda rights were not violated;

(2) The trial court erred in failing to conduct a sufficient voir dire of jurors Ward and Witek;
(3) The trial court erred in denying defense counsel's request for a "rule on witnesses" during jury voir dire;
(4) The trial court erred in refusing jury instructions D, V, MM and PP offered by defense counsel;
(5) The trial court erred in denying defense counsel's motion to strike the abduction with intent to defile charge; and
(6) The trial court erred in refusing, after the evidentiary hearing upon remand, to order a new trial based on the alleged misconduct of Juror Haley;

(B) Ineffective assistance of counsel:

(1) At trial, for deciding not to introduce into evidence a judgment entered against the victim in 1995 for overpayment of unemployment benefits;
(2) At trial, for failing to properly voir dire prospective jurors;
(3) At trial, for using an unqualified expert;
(4) At trial, for failing to object to the prosecutor's improper remarks during closing arguments;
(5) At trial, for allowing the evidentiary hearing on juror misconduct to be conducted while only four (4) members of the jury panel were present;
(6) At trial, for failing to have Tony Shaw, attorney, present for the suppression hearing regarding the alleged Miranda violation;
(7) At trial, for failing to make an adequate proffer for the admission of testimony from Evans' Aunt; and
(8) On appeal, for failing to raise any issue besides the claim surrounding the alleged juror misconduct; and

(C) Sufficiency of the evidence to support the guilty verdicts for the charged offenses.

It appears that only claim A(6) was presented by Evans on direct appeal (raised as the first ground of error in the First State Petition for Appeal, see supra note 2, and as the only ground of error in the Second State Petition for Appeal, see supra note 4). None of the other state habeas claims alleging

by the Circuit Court by order entered May 11, 2006. Case No. CL05001347 ("Evans VI").[9] On August 1,

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trial court error or insufficient evidence were presented on direct appeal.

Though Evans could not raise claim B(7) on direct appeal, see Lenz v. Washington, 444 F.3d 295, 302 (4th Cir. 2006) (under Virginia law, ineffective assistance of counsel claims are cognizable only on collateral review) (citing Johnson v. Commonwealth, 259 Va. 654, 675 (2000)), Evans did present the facts underlying this ineffective-assistance-of-counsel allegation as the second ground of error in his Second State Petition for Appeal, see supra note 2. Evans did not provide any factual support in his direct appeals for any of the other state habeas claims alleging ineffective assistance of counsel.

[9] In denying the petition, the Circuit Court found that state habeas claims A(1) through A(6) (alleging trial court errors) and claim C (challenging sufficiency of the evidence) were procedurally barred under Virginia law. Evans VI, at 5. The court also found that claims B(1) through B(8), alleging ineffective assistance of counsel, failed under the "performance" and "prejudice" prongs of Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Evans VI, at 6-13. Specifically, the Circuit Court found:

1. Each of state habeas claims A(1) through A(6) was procedurally barred because a habeas corpus proceeding cannot be used as a substitute for trial and direct appeal. Evans VI, at 5 (citing Henry v. Warden, 265 Va. 246, 248 (2003) (claims raised and resolved against a habeas petitioner at trial or on direct appeal are not cognizable in habeas corpus); Slayton v. Parrigan, 215 Va. 27, 30 (1974) (any claim that could have been raised at trial or on direct appeal is not cognizable in habeas corpus)).

2. State habeas claim C was procedurally barred under Virginia law because insufficiency of the evidence claims are not cognizable in habeas corpus. Evans VI, at 5 (citing Pettus v. Peyton, 207 Va. 906, 911 (1967) (challenges to sufficiency of evidence must be made on direct appeal and cannot be collaterally attacked in a habeas proceeding); Slayton, 215 Va. at 30, supra).

3. State habeas claim B(1) had no merit since the court found that the judgment entered against the victim was a civil judgment, which, under Virginia law, could not have been used to impeach the victim's credibility since it was not a conviction for a felony or a misdemeanor involving moral turpitude. Evans VI, 6-7.

4. State habeas claim B(2) had no merit because the actions of counsel with respect to jury voir dire are considered a matter of trial strategy. Id. at 7 (citing Teague v. Scott, 60 F.3d 1167, 1172 (5th Cir. 1995) (reviewing court will not second-guess counsel's trial strategy regarding jury selection)). The court found that only one of the four prospective jurors of which Evans complained was actually selected for the jury panel, and the court further found that juror specifically stated during voir dire that he was not biased against Evans. Id.

5. State habeas claim B(3) had no merit because the choice of which expert to use at trial is a matter of counsel's trial strategy. Id. at 7-8 (citing Bassett v. Thompson, 915 F.2d 932, 940 (4th Cir. 1990) (failure to proffer testimony from the witness petitioner claims his counsel should have called is fatal to ineffective-assistance-of-counsel claim)). The court noted that the doctor used as an expert witness by defense counsel was "an OB/GYN specialist who had testified in 7 or 8 criminal cases, and was accepted as an expert by the Court in this case." Id. at 7.

6. State habeas claim B(4) had no merit because, contrary to Evans' allegations, the prosecutor did not make any improper remarks during her closing argument, thus counsel was not ineffective for failing to raise a "baseless objection." Id. at 8.

7. State habeas claim B(5) had no merit because Evans had failed to establish any violation of his rights as a result of the alleged juror misconduct involving Juror Haley, as specifically found by the trial court, the Court of Appeals and the Supreme Court of Virginia. Id. at 8-9. The court found Evans could not establish his claim based solely on "his own self-serving speculation" or "on silence from the other jurors." Id. (citing Sandlewood v. Gibson, 191 F.3d 1277, 1280 n.4 (10th Cir. 1999); Bassett, 915 F.2d at 940)).

2006, Evans executed a pro se petition for appeal of that decision in the Supreme Court of Virginia

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8. State habeas claim B(6) had no merit because none of the testimony that may have been offered by Tony Shaw at the suppression hearing would have been relevant to the issue at the suppression hearing, namely, the admissibility of Evans' statement under Miranda. Id. at 9-11. Further, the court noted that it is trial counsel's discretion as to which witnesses to call at trial, and such an inquiry after the fact "is no more relevant to the Strickland inquiry because it is counsel second-guessing himself." Id. at 11 (citing Jones v. North Carolina, 547 F.2d 808 (4th Cir. 1977); Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988); Sykes v. Virginia, 364 F.2d 314 (4th Cir. 1966)).

9. State habeas claim B(7) had no merit because the testimony of the witness that Evans claims should have been proffered was inadmissible hearsay in the first instance, as it did not satisfy any of the recognized hearsay exceptions, and because whether the victim owed money to Evans was irrelevant and "was no defense to what [Evans] did to her." Id. at 12 (citing Manetta v. Commonwealth, 231 Va. 123, 128 n.3 (1986); Evans-Smith, 5 Va. App. 188, 197 (1987)). In so ruling, the court considered the contents of an affidavit by Evans' Aunt, submitted by Evans in support of the State Habeas Petition. Id.

10. State habeas claim B(8) had no merit because counsel has discretion to "winnow[] out weaker arguments on appeal and [to] focus[] on one central issue if possible, or at most on a few key issues." Id. at 13 (quoting Jones v. Barnes, 463 U.S. 745, 751-52 (1983)). The court recognized Evans' failure to acknowledge that his appellate counsel did "prevail[] on the juror misconduct issue, at least in the short run," since he was awarded an appeal on that issue by the Court of Appeals. Id. Finally, the court rejected Evans' conclusory claim that other issues should have been raised on appeal, finding there had been no showing that, but for the alleged error by counsel, Evans would have prevailed on his appeal. Id. (citing Smith v. Robbins, 528 U.S. 259, 285 (2000)).

("Fourth State Petition for Appeal").[10] By order entered December 11, 2006, the Supreme Court of Virginia summarily refused the petition, finding no reversible error. Record No. 061668 ("Evans VII").

On December 30, 2006, while in the custody of the Virginia Department of Corrections at the Lawrenceville Correctional Center, Evans executed the instant federal petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("Federal Habeas Petition").[11] The instant petition,

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[10] The petition appears to have been executed on August 1, 2006, but it was not stamped as received and filed by the court until August 10, 2006. In his petition, Evans raised the following grounds for appeal:

(1) Evans did not receive a fair evidentiary hearing on the alleged juror misconduct issue due to the trial court's bias and/or ineffective assistance of counsel;

(2) Evans did not receive a fair trial and appeal because of the ineffective assistance of counsel in litigating the "sufficiency of evidence" question;

(3) Evans did not receive a fair trial by an impartial jury because of the alleged juror misconduct issue; and

(4) The evidence was insufficient to establish his guilt for the sexual offenses and the abduction with the intent to defile charge.

[11] The Federal Habeas Petition appears to have been executed on December 30, 2006, was received by the United States District Court for the Eastern District of Virginia, Richmond Division, on January 5, 2007, and conditionally filed with this Court on January 12, 2007.

Pursuant to the Habeas Rule 3(d) of the Rules Governing Section 2254 Cases ("Habeas Rules"), as amended on December 1, 2004, the Court recognizes the prison mailbox rule for federal habeas petitions. Accordingly, as there is no evidence in the record to the contrary, the Court will assume

accompanied by a supporting memorandum and exhibits (collectively, "Petitioner's Supporting Memorandum"), was filed in this Court on January 12, 2007. On February 16, 2007, Respondent filed his Rule 5 Answer and Motion to Dismiss, accompanied by a supporting brief ("Respondent's Brief"), and a Notice of Motion Pursuant to Local Rule 7(K). On March 9, 2007, the Court received from Evans a Traverse in Support of Motion to [sic] Respondent's Motion to Dismiss ("Petitioner's Reply Brief").

B. Grounds Alleged

Evans now asserts in this Court that he is entitled to relief under 28 U.S.C. § 2254 for the reasons substantially as follow:[12]

(1) Evans' constitutional rights to a fair trial by an impartial jury were violated when a juror was told negative comments about Evans and the state court declined to grant a new trial on that basis;

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that Evans delivered his federal habeas petition for mailing on the date of execution, December 30, 2006. Further, the Court considers the petition as being filed, for statute of limitations purposes, on that date.

[12] The Court notes that Evans specifically enumerated four (4) separate grounds for relief, see Federal Habeas Petition, at 6-12, but in his supporting memorandum he asserts a number of allegations that the Court has construed as separate claims for relief, see generally Petitioner's Supporting Memorandum. The Court further notes that because Evans has failed to use a consistent numbering scheme in identifying the various claims in the instant petition, the Court will adopt the nomenclature as presented by Respondent in addressing those claims. See Respondent's Brief, at 3-4.

(2) Ineffective assistance of counsel for failure to move for the recusal of the trial judge at the evidentiary hearing on the alleged juror misconduct issue after the judge had previously denied Evans' motion for a new trial on that issue;
(3) Evans' constitutional rights to a fair trial were violated because the trial judge was biased against him;
(4) Ineffective assistance of counsel for failure to investigate Evans' case;
(5) Ineffective assistance of counsel for failure to advocate Evans' cause;
(6) Ineffective assistance of counsel for failure to consult with Evans regarding important decisions in his case;
(7) Ineffective assistance of counsel for failure to keep Evans informed about his case;
(8) Ineffective assistance of counsel for failure to raise on appeal the defense of "consensual intercourse" and "evidentiary sufficiency issues";
(9) Ineffective assistance of counsel for failure to raise on appeal the issue of judicial bias;
(10) Ineffective assistance of counsel for failure to raise on appeal that the state court applied the incorrect legal standard regarding the alleged juror misconduct issue; and
(11) Insufficiency of the evidence to support the guilty verdicts because the victim was not credible and her testimony differed from that of Evans.

Evans raised only a portion of these claims in the state court, either on direct appeal or in habeas. Claim 1 was raised by Evans on direct appeal; that

claim was denied by the Circuit Court initially (Evans I) and following the evidentiary hearing upon remand, by the Court of Appeals (Evans III, Evans IV), and by the Supreme Court of Virginia (Evans V). Evans also presented Claim 1 as Claim A(6) in his State Habeas Petition, which was denied by the Circuit Court (Evans VI) and by the Supreme Court of Virginia on appeal (Evans VII). Evans did not present any of Claims 2-10 on direct appeal or in the State Habeas Petition.[13] Claim 11 was not presented on direct appeal, but it was presented as Claim (C) in the State Habeas Petition, which was denied by the Circuit Court (Evans VI) and by the Supreme Court of Virginia on appeal (Evans VII).

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[13] The Court recognizes that none of the instant Claims 2 and 4-10, raising ineffective assistance of counsel, could have been raised on direct appeal since such claims are cognizable only in a habeas proceeding. See Lenz v. Washington, 444 F.3d 295, 302 (4th Cir. 2006) (under Virginia law, ineffective assistance of counsel claims are cognizable only on collateral review) (citing Johnson v. Commonwealth, 259 Va. 654, 675 (2000)).

Claim 3 could have been raised by Evans on direct appeal, but was not. Evans did suggest that the trial judge was biased against him as part of the first ground for appeal in his Fourth Habeas Petition, see supra, note 10, but he never raised the claim directly in his State Habeas Petition. The Court notes that the inclusion of this claim in the petition for appeal was insufficient to preserve the claim in the first instance. See Va. Code Ann. § 8.01-654(B)(2) (requiring state habeas petition to contain all allegations, the facts of which are known to petitioner at time of filing; denying grant of writ on any allegations, the facts of which are known to petitioner at time of filing any previous petition).

II. PETITIONER'S REQUESTS FOR AN EVIDENTIARY HEARING AND FOR APPOINTMENT OF COUNSEL

As a preliminary matter, the Court considers Evans' requests for an evidentiary hearing and for appointment of counsel. The Court has determined that an evidentiary hearing is not required, as purely legal issues are presented and the record before the Court adequately resolves the legal issues raised. See Habeas Rule 8. Moreover, Evans has not alleged any "exceptional circumstances" that would warrant appointment of counsel in this matter. See Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975); Griffin v. Virginia, 606 F. Supp. 941, 943 (E.D. Va. 1985), aff'd, 780 F.2d 1018 (4th Cir. 1985) (unpublished table decision). Accordingly, the Court DENIES Evans' request for an evidentiary hearing and DENIES Evans' request for appointment of counsel.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court FINDS that each of Evans' claims are exhausted and procedurally defaulted for purposes of federal habeas review, and that Evans has failed to demonstrate cause and actual prejudice or actual innocence to excuse the procedural default. Accordingly, the Court declines to address the instant Claims 1-11 on the merits.[14]

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[14] The Court notes that Respondent has not addressed whether the instant Federal Habeas Petition was timely filed. See Day v. McDonough, 547 U.S. 198, 126 S. Ct. 1675, 1684 (2006) (federal habeas courts are "permitted, but not obligated,

A. Exhaustion and Procedural Default

Ordinarily, a state prisoner must exhaust remedies available in state court before seeking federal habeas corpus relief. 28 U.S.C. § 2254(b) and (c); Picard v. Conner, 404 U.S. 270, 275 (1971). As such, this Court cannot grant habeas relief unless a petitioner has exhausted the remedies available to him in the courts of Virginia. See O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Exhaustion may be accomplished either on direct appeal or in post-conviction proceedings. See id. at 844 (if a claim has been addressed by the state's highest court on either

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to consider sua sponte, the timeliness of a state prisoner's habeas petition"). It appears that Evans' convictions became final on October 6, 2004, which was ninety (90) days after the denial of his direct appeal on July 8, 2004 by the Supreme Court of Virginia (Evans VI) and the date upon which the period for seeking direct review of his conviction by the United States Supreme Court expired. See U.S. Sup. Ct. R. 13(1); Harris v. Hutchinson, 209 F.3d 325, 328 n.1 (4th Cir. 2000). Accordingly, Evans had a one-year statute of limitations from that date, or until October 6, 2005, in which to file his habeas petition with this Court. 28 U.S.C. § 2244(d)(1). The instant Federal Habeas Petition was not filed until December 30, 2006. See supra note 11. However, because the limitations period may be tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending . . . ," 28 U.S.C. § 2244(d)(2), Evans was entitled to tolling for 522 days during the pendency of his state-habeas proceedings (between July 7, 2005, when the State Habeas Petition was filed, see supra note 7, and December 11, 2006, when the petition was dismissed by the Supreme Court of Virginia, Evans VII). Accordingly, Evans had until March 12, 2007 to file a federal habeas petition. Because the Federal Habeas Petition was considered as filed on December 30, 2006, the petition was timely filed in this Court.

direct or collateral review, it is exhausted) (citing Brown v. Allen, 344 U.S. 443, 447 (1953)); see also Skipper v. French, 130 F.3d 603, 610 n.4 (4th Cir. 1997). "Section 2254(c) requires only that state prisoners give state courts a fair opportunity to act on their claims," thus a petitioner "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." Id. at 844-45 (emphasis in original). In order for a claim to be considered exhausted, it must be "'fairly presented' to the state courts," which means "that both the operative facts and the 'controlling legal principles'" must be presented to the state court." Matthews v. Evatt, 105 F.3d 907, 910-11 (4th Cir. 1997) (quoting Pickard v. Connor, 404 U.S. 270, 275-78 (1971); Verdin v. O'Leary, 972 F.2d 1467, 1474 (7th Cir. 1992)); Pruett v. Thompson, 771 F. Supp. 1428, 1436 (E.D. Va. 1991), aff'd 996 F.2d 1560 (4th Cir. 1993) (exhaustion requirement is satisfied when "allegations advanced in federal court . . . [are] the same as those advanced at least once to the highest state court.")

It is the petitioner's burden to prove that his claims have been exhausted. Matthews, 105 F.3d at 911. If his claims could not be exhausted in state court because they were procedurally barred in state court pursuant to an adequate and independent state procedural rule, the claims are procedurally defaulted in federal court and federal habeas review is ordinarily barred. Coleman v. Thompson, 501 U.S. 722, 750 (1991); Matthews, 105 F.3d at 911 ("the exhaustion requirement for claims not fairly presented to the state's highest court is technically

met when . . . a state procedural rule would bar consideration if the claim was later presented to the state court"). Such claims are treated as procedurally defaulted and barred from this Court's review. Clagett v. Angelone, 209 F.3d 370, 378-79 (4th Cir. 2000).

In the instant case, Respondent asserts that each of Evans' claims are exhausted – either because they were presented to the Supreme Court of Virginia on direct appeal or in a habeas proceeding,[15] or because they are simultaneously exhausted and procedurally defaulted as having never been properly presented to the Supreme Court of Virginia, and they would now be barred from review by the Supreme Court of Virginia as procedurally defaulted under Virginia law.[16] Respondent's Brief, at 4-5.

1. Claims 2-10 are Exhausted and Procedurally Defaulted

Respondent asserts that the instant Claims 2-10 (collectively, the "9-defaulted claims")[17] were

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[15] See O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999) (if a claim has been addressed by the state's highest court on either direct or collateral review, it is exhausted) (citing Brown v. Allen, 344 U.S. 443, 447 (1953)).

[16] See Va. Code Ann. § 8.01-654(B)(2) (requiring state habeas petition to contain all allegations, the facts of which are known to petitioner at time of filing; denying grant of writ on any allegations, the facts of which are known to petitioner at time of filing any previous petition); see also Clagett, 209 F.3d at 378-79.

[17] Each of these claims, except for Claim 3, raised ineffective assistance of counsel by Evans' trial and/or appellate

never properly presented by Evans to the state courts, and therefore these claims are simultaneously exhausted and procedurally defaulted in this Court. Respondent's Brief, at 5. The Court concurs and has determined that Evans failed to properly raise the allegations and facts underlying the 9-defaulted claims in accordance with Virginia's state-habeas procedures.

Evans had knowledge of the facts underlying the 9-defaulted claims at the time he filed his State Habeas Petition, and he could have raised the claims at that time. In alleging that he received ineffective assistance of counsel, Evans' State Habeas Petition raised a number of allegations regarding his counsels' performance, including that his trial counsel failed to: introduce certain evidence, properly question the jurors during voir dire, use a qualified expert, object to the prosecutor's closing argument, object to the conduct of the evidentiary hearing, offer a witness during the suppression hearing, and make proffer of a witness' testimony; Evans also alleged that his appellate counsel was ineffective for failing to raise any issue other than the alleged juror misconduct issue. See supra note 8. Also, Evans' State Habeas Petition alleged that the trial-court judge not only erred in denying the motion for a new trial, but he also erred in making

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counsel. Claim 3, by comparison, raised allegations of bias against the trial-court judge. The Court notes that to the extent Claim 3 purports to allege error by the trial-court judge in relation to the denial of the motion to grant a new trial because of the alleged juror misconduct issue, then such allegations are implicitly considered in relation to those presented in Claim 1, see infra Section III.A.2.

certain evidentiary rulings and in denying certain jury instructions, in his handling of the jury during voir dire, and in refusing to strike one of the charges against Evans. Id. Finally, Evans generally averred that the evidence was insufficient against him at trial. Id. Evans did not, however, present the specific allegations presented in the 9-defaulted claims, see supra Section I.B. Consequently, because Evans failed to raise the 9-defaulted claims in his State Habeas Petition, the claims would now be barred from review by the Supreme Court of Virginia as procedurally defaulted under Virginia law, Va. Code Ann. § 8.01-654(B)(2).[18] See Clagett, 209 F.3d 370 at 378-79. This rule has been held to be an "adequate and independent state ground" barring federal habeas review of the defaulted claims. Pope v. Netherland, 113 F.3d 1364, 1372 (4th Cir. 1997). Accordingly, the Court FINDS that the instant Claims 2-10 are exhausted due to procedural default

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[18] The Court notes that this provision of Virginia law explicitly requires a petitioner seeking a writ of habeas corpus to include all allegations, the facts of which are known to him at the time of filing a state habeas petition. See Va. Code Ann. § 8.01- 654(B)(2) (first sentence). Also, this provision explicitly denies the grant of a writ of habeas corpus on any subsequent petition as to any allegations, the facts of which were known to a petitioner at the time he filed any previous petition. Id. (second sentence).

The Court further notes, however, that the above provisions do not apply to a petitioner's first petition for a writ of habeas corpus "when the sole allegation of such petition is that the petitioner was deprived of the right to appeal from a final judgment of conviction . . ., except that such petition shall contain all facts pertinent to the denial of the appeal that are known to the petitioner at the time of the filing." Id. (third sentence) (emphasis added)

because they were never properly presented to the Supreme Court of Virginia.[19] Coleman, 501 U.S. at 750.

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[19] The Court finds unpersuasive Evans' argument that he did properly present his Claims 2-10 to the Supreme Court of Virginia. See Petitioner's Reply Brief, at 1-3. To the contrary, it does not appear any of the facts underlying these allegations were presented in the State Habeas Petition. Specifically, the Court rejects Evans' assertion that he presented the instant Claim 2 at pages 11 and 14 of his State Habeas Petition, Id. at 3, as well as his assertion that Claims 3-10 were submitted to the Supreme Court of Virginia, Id. (Evans makes this conclusory assertion without reference to any of his state-habeas filings). Consequently, the Court does not consider these claims to have been properly presented for review by the state courts because Evans failed to present the basis for the claims in his State Habeas Petition, which represented his first collateral attack in a habeas proceeding. See Va. Code Ann. § 8.01-654(B)(2) ("No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.")

The Court further notes that it does appear Evans presented portions of these claims in his State Petition for Appeal. This includes some of the facts underlying Claims 2 and 3 (regarding trial-court bias) and Claim 8 (regarding sufficiency of the evidence on appeal). However, these later presentations are not sufficient to satisfy the requirements of Va. Code Ann. § 8.01-654(B)(2). See also supra notes 13, 16.

Also, the Court does not consider Evans' general averments of ineffective assistance of counsel, namely, that his trial and appellate counsel's "performance fell below that expected of a reasonably competent attorney" and that they "failed to subject the states [sic] case to meaningful adversarial testing," State Habeas Petition, at 10-11, to adequately support the specific allegations now presented in the 9-defaulted claims.

2. Claim 1 is Exhausted and Procedurally Defaulted

Respondent asserts that the instant Claim 1 (alleging the state court erred in denying Evans' motion for a new trial based on the alleged juror misconduct claim) is barred from review in this Court because that claim was barred from review under state procedural rules. Respondent's Brief, at 6. Evans did present Claim 1 to the state court on direct appeal, though it was ultimately decided against him, and as Claim A(6) in his State Habeas Petition, whereupon it was dismissed as procedurally barred by the Circuit Court under Henry, 265 Va. at 248, applying the rule of Slayton, 215 Va. at 29 (petition for writ of habeas corpus does not serve as substitute for direct appeal) (Evans VI). See supra note 9. The courts consistently have held that Slayton constitutes an independent-and-adequate state-law ground so as to support procedural default in federal court. Smith v. Murray, 477 U.S. 527, 533 (1986); Wright v. Angelone, 151 F.3d 151, 159-60 (4th Cir. 1998). His subsequent petition for appeal of the denial of that claim (raised as the first ground for appeal in the Third State Petition for Appeal) was also summarily denied by the Supreme Court of Virginia, finding no reversible error (Evans VII). When the Supreme Court of Virginia summarily refuses a petition for appeal, this Court looks to the previous state court decision as the last reasoned state judgment on that claim. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). Accordingly, based on the Circuit Court's decision in Evans VI, supra, this Court FINDS that the instant Claim 1 is simultaneously exhausted and

procedurally defaulted for purposes of federal habeas review because it was rejected under an independent-and-adequate state-law ground. Clagett, 209 F.3d at 378-79.

3. Claim 11 is Exhausted and Procedurally Defaulted

Respondent also asserts that the instant Claim 11 (alleging the evidence was insufficient to support the guilty verdicts) is barred from review in this Court because that claim was barred from review under state procedural rules. Respondent's Brief, at 6. Evans did not present Claim 11 to the state court on direct appeal, but he did present it as Claim C in his State Habeas Petition, whereupon it was dismissed as procedurally barred by the Circuit Court by applying the rules of Pettus v. Peyton, 207 Va. 906, 911 (1967) (challenges to sufficiency of evidence must be made on direct appeal and cannot be collaterally attacked in a habeas proceeding) and Slayton, 215 Va. at 29 (petition for writ of habeas corpus does not serve as substitute for direct appeal) (Evans VI). See supra note 9. The courts consistently have held that such rules constitute independent-and-adequate state-law grounds so as to support procedural default in federal court. Smith v. Murray, 477 U.S. 527, 533 (1986); Wright v. Angelone, 151 F.3d 151, 159-60 (4th Cir. 1998). His subsequent petition for appeal of the denial of that claim (raised as the fourth ground for appeal in the Fourth State Petition for Appeal) was also summarily denied by the Supreme Court of Virginia, finding no reversible error (Evans VII). As such, this Court looks to the decision by the Circuit Court (Evans VI) as the last

reasoned state judgment on that claim. Ylst, 501 U.S. at 803. Accordingly, this Court FINDS that the instant Claim 11 is simultaneously exhausted and procedurally defaulted for purposes of federal habeas review because it was rejected under an independent-and-adequate state-law ground. Clagett, 209 F.3d at 378-79.

4. Limited Exceptions to Procedural Default

The Court has determined that the instant Claims 1-11 of the Federal Habeas Petition are procedurally defaulted because they were never properly presented to the Supreme Court of Virginia, supra. Nevertheless, Evans can still obtain review of his claims in this Court if he can meet one of the exceptions to the procedural-default doctrine. Generally, a petitioner may still obtain review of any procedurally-defaulted claims if he can establish either: (1) "cause and prejudice" (i.e., cause for the default and demonstrate actual prejudice as a result of the failure to review the claim), or (2) "actual innocence" (i.e., that failure to consider the claim will result in a fundamental miscarriage of justice because he is actually innocent of the crime for which he was convicted). Clagett, 209 F.3d at 379 (citing Coleman v. Thompson, 501 U.S. 722, 750 (1991)); Weeks v. Angelone, 176 F.3d 249, 269 (4th Cir. 1999).

a. Cause and Actual Prejudice Exception

As to the first exception, cause refers to "some objective factor external to the defense" that impeded compliance with the state's procedural rule.

Strickler v. Greene, 527 U.S. 263, 283 n.24 (1999) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)).

> Objective factors that may constitute "cause" include: (1) "interference by officials that makes compliance with the State's procedural rule impracticable"; (2) "a showing that the factual or legal basis for a claim was not reasonably available to counsel"; (3) novelty of the claim; and (4) constitutionally ineffective assistance of counsel.

Wright v. Angelone, 151 F.3d 151, 160 n.5 (4th Cir. 1998) (quoting McCleskey v. Zant, 499 U.S. 467, 493-94 (1991)). An absence of due diligence by the petitioner will defeat an assertion of cause. See Hoke v. Netherland, 92 F.3d 1350, 1354 n.1 (4th Cir. 1996). In the instant case, Evans does not provide the Court with any grounds on which to find cause to excuse the procedural default. First, Evans has failed to make any showing that action by the government prevented him from raising the issue on appeal. See Smith v. United States, 2005 WL 2657386 at *2 (E.D. Va.). Second, Evans has not made a credible showing that he or his counsel were unaware of the circumstances underlying this claim.[20] See id. Third, Evans does not make any

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[20] Indeed, to the extent that Evans argues he should be excused for his unfamiliarity with the legal system and his pro se status, such factors do not constitute cause because these are not "objective factor[s] external to the defense" under Murray, 477 U.S. at 488. See, e.g., Dellinger v. Bowen, 301 F.3d 758, 766 (7th Cir. 2002) ("youth and lack of education do not constitute the type of external impediment sufficient to excuse

assertion of a new rule of law that would justify cause in this instance. See generally Williams v. French, 146 F.3d 203, 209 (4th Cir. 1998). Finally, Evans cannot establish cause for the procedural default of these claims by asserting ineffective assistance of counsel at this juncture because he never properly presented such claims to the state's highest court. See Edwards v. Carpenter, 529 U.S. 446, 453 (2000); see also Williams v. French, 146 F.3d 203, 210 n.9 (4th Cir. 1998) (ineffective assistance of counsel claim "must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default") (citing Murray v. Carrier, 477 U.S. 478, 489 (1986)). In all respects, therefore, none of the above-referenced factors support a finding of cause. Consequently, Evans has failed to establish the requisite cause for his failure to comply with the applicable state procedural rules in order for this Court to review the instant Claims 2-10 on the merits.[21]

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a procedural default"), cert. denied, 537 U.S. 1214 (2003); Washington v. James, 996 F.2d 1442, 1447 (2d Cir. 1993) (ignorance or inadvertence do not constitute cause to excuse a procedural default); United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004) (pro se petitioner's ignorance and misconceptions about the operation of the statute of limitations do not justify equitable tolling because they are not extraordinary circumstances beyond his control).

[21] Insofar as Evans has failed to establish the requisite cause to excuse the procedural default, the Court need not consider whether he has provided adequate grounds for a determination of actual prejudice as a result of the defaulted claims. The Court does note, however, that to establish prejudice, it is the petitioner's burden to demonstrate "not merely that the errors at his trial created a possibility of

b. Actual Innocence Exception

As to the second exception, Evans has asserted he is innocent of the crimes for which he was convicted and he alleges that a fundamental miscarriage of justice would result from the failure to hold an evidentiary hearing as to his claims. See Petitioner's Supporting Memorandum, at 5, 38-41 (citing Murray v. Carrier, 477 U.S. 478, 480 (1986); Schlup v. Delo, 513 U.S. 298, 321 (1995)). To that end, the Court construes Evans to argue that his default is excusable under the "fundamental miscarriage of justice" exception, based upon a showing of actual innocence, which presumably would have been established had certain evidence been presented at trial. See generally id.

The Court recognizes that the "actual innocence" doctrine is functionally equivalent to the "miscarriage of justice" exception. See Edwards v. Carpenter, 529 U.S. 446, 451 (2000); United States v. Mikalajunas, 186 F.3d 490, 493 (4th Cir. 1999), cert denied, 529 U.S. 1010 (2000). Also, "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise

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prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Williams, 146 F.3d at 210 (quoting United States v. Frady, 456 U.S. 152, 170 (1982)) (other citations omitted). Further, even in the instance where error occurred, a petitioner must show actual disadvantage, as a result, and not merely a possibility of harm. Satcher v. Pruett, 126 F.3d 561, 572 (4th Cir. 1997); see also Pope v. Netherland, 113 F.3d 1364, 1371 (4th Cir. 1997).

[procedurally] barred constitutional claim considered on the merits." Herrera v. Collins, 506 U.S. 390, 404 (1993). To assert this exception, a petitioner must demonstrate factual innocence, not merely the legal insufficiency of his conviction or sentence. Bousley v. United States, 523 U.S. 614, 623-24 (1998). Despite procedural default, therefore, the Court may reach the merits of Evans' claims, but only upon a showing that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup, 513 U.S. at 327 (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)).[22] Moreover, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Id. at 327. Indeed, "[b]ecause such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." Id. at 324.

Evans must therefore show that "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." Id.

> The meaning of actual innocence . . . does not merely require a showing that a reasonable doubt exists in light of the new evidence, but rather than no reasonable juror would have found the defendant guilty. . . . [A] petitioner does not meet the threshold requirement unless he persuades the district court that, in

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[22] The Court notes that in some circumstances, the federal court may have discretion to deny review on procedural default grounds even after the petitioner has shown actual innocence. See O'Dell, 95 F.3d at 1247 n.27.

> light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

Id. at 329. Further, in those cases in which the federal courts have entertained claims of actual innocence, the courts have held that a petitioner must "support his allegations of constitutional error with new reliable evidence . . . that was not presented at trial." Id. at 324; Royal v. Taylor, 188 F.3d 239, 244 (4th Cir. 1999) (quoting Schlup, 513 U.S. at 324). To the extent such evidence is offered by the petitioner, the Court must evaluate the credibility of the new evidence. See O'Dell v. Netherland, 95 F.3d 1214, 1250 (4th Cir. 1996), aff'd, 521 U.S. 151 (1997). It is the petitioner's burden to establish the exception, which requires a showing that but for the asserted constitutional errors, no reasonable juror would have found him guilty. See Hazel v. United States, 303 F. Supp. 2d 753, 761 (E.D. Va. 2004) (citing Herrera v. Collins, 506 U.S. 390, 401-02, 429 (1993) (White, J., concurring), incorporating the standard established in Jackson v. Virginia, 443 U.S. 307, 317 (1979)).

In the instant case, Evans has attempted to assert this exception in his various pleadings, but his arguments largely consist of conclusory allegations without the requisite factual support to establish his actual innocence. For example, Evans asserts that he "has suffered a fundamental miscarriage of justice, [and] therefore, a decision on the merits [of his federal habeas claims] is appropriate without regard to procedural default." Petitioner's Supporting Memorandum, at 3. He further asserts

that this Court's failure to review his procedurally defaulted claims would "thwart the 'Ends of Justice.'" Id. (citations omitted). Evans offers no support for these assertions other than a number of conclusory arguments that various rulings by the trial judge were wrong, that his trial and appellate counsel were ineffective in various respects,[23] and that the evidence was insufficient for him to have been convicted. Indeed, in arguing the insufficiency of the evidence claim, specifically, Evans asserts (after summarizing much of the physical evidence and testimony presented at trial):

> With confidence[,] the jury abandoned critical physical and scientific evidence and trustworthy testimony that was presented at trial. Evans was convicted of crimes he did not commit.
>
> [The victim]'s means of escaping her drug debt was to bring up charges of rape against a guiltless man. Therefore, due to Evans['] innocence[,] he must be excused of any default in any or all of his claims.

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[23] Again, the Court rejects Evans' argument that he has established cause and prejudice for the procedural default due to the ineffective assistance of counsel. Petitioner's Supporting Memorandum, at 32. As discussed supra, a habeas petitioner cannot rely on ineffective assistance of counsel as cause for a procedural default without first exhausting the ineffective assistance of counsel claims in state proceedings. See Edwards v. Carpenter, 529 U.S. 446, 453 (2000); see also Williams v. French, 146 F.3d 203, 210 n.9 (4th Cir. 1998) (ineffective assistance of counsel claim "must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default") (citing Murray v. Carrier, 477 U.S. 478, 489 (1986)).

> By virtue of innocence[,] there has been a manifest injustice and/or a denial of fundamental fairness in Evans'[] conviction. He was denied a fair and full opportunity in state court to raise his defense of consensual sex and actual innocence at trial and on direct appeal.

Petitioner's Supporting Memorandum, at 38.

None of these arguments satisfy the standard to present "new reliable evidence . . . not presented at trial," Royal, 188 F.3d at 244, so as to establish a claim of actual innocence. Evans does not identify new evidence to establish a basis upon which this Court can conclude that, but for the failure of this evidence to be presented at trial, no reasonable juror would have convicted him. Schlup, 513 U.S. at 327. The jury had the benefit of hearing the evidence at trial and was able to weight it accordingly. Evans' conclusory claims of "fundamental miscarriage of justice" fail to meet his burden to establish that no reasonable juror would have found him guilty, see Weeks, 176 F.3d at 269, and consequently, are insufficient for this Court to excuse the procedural default and consider Evans' claims on the merits.[24]

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[24] The Court also rejects Evans' assertion that his is "an extraordinary case," in which "a constitutional violation resulted in the conviction of one who is actually innocent," such that the "federal court may grant the writ even in the absence of a showing of cause for the procedural default." Petitioner's Supporting Memorandum, at 39 (citing Murray v. Carrier, 477 U.S. 478, 480 (1986); Schlup v. Delo, 513 U.S. 298 (1995)). Indeed, the Supreme Court has recognized that those cases worthy of the fundamental miscarriage of justice exception are "rare" and must present "extraordinary" circumstances, and

As such, the Court FINDS that Evans has failed to establish there was new reliable evidence that was not presented at trial that would have made it more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. Accordingly, the Court FINDS that the claims raised in the instant petition are procedurally barred before this Court and RECOMMENDS denial of Evans' petition with respect to all claims. Based on the foregoing, the Court FINDS that Claims 1-11 raised in the instant Federal Habeas Petition are procedurally barred before this Court, and recommends that these claims should be DENIED.

IV. RECOMMENDATION

For the foregoing reasons, having DENIED Evans' requests for an evidentiary hearing and for the appointment of counsel, the Court recommends that Evans' petition for a writ of habeas corpus be DENIED, that Respondent's motion to dismiss be GRANTED, and that all of Evans' claims be DISMISSED WITH PREJUDICE. Evans has failed to demonstrate "a substantial showing of the denial of a constitutional right." Therefore, it is recommended that the Court decline to issue any certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure. See Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003).

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that the exception is "explicitly tied . . . to the petitioner's innocence." Schlup, 513 U.S. at 321. Evans has not demonstrated that his case rises to this level.

V. REVIEW PROCEDURE

By copy of this Report and Recommendation, the parties are notified that:

1. Any party may serve upon the other party and file with the Clerk specific written objections to the foregoing findings and recommendations within ten (10) days from the date of mailing of this report to the objecting party, see 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), computed pursuant to Rule 6(a) of the Federal Rules of Civil Procedure, plus three (3) days permitted by Rule 6(e) of said rules. A party may respond to another party's specific objections within ten (10) days after being served with a copy thereof. See Fed. R. Civ. P. 72(b).

2. A district judge shall make a de novo determination of those portions of this report or specified findings or recommendations to which objection is made. The parties are further notified that failure to file timely objections to the findings and recommendations set forth above will result in a waiver of the right to appeal from a judgment of this Court based on such findings and recommendations. Thomas v. Arn, 474 U.S. 140 (1985); Carr v. Hutto, 737 F.2d 433 (4th Cir. 1984); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

Entered on July 31, 2007

/s/
F. Bradford Stillman
United States Magistrate Judge

VIRGINIA:

In the Court of Appeals of Virginia, on Wednesday the 20th day of August, 2003.

Roland A. Evans, Appellant,

Against Record No. 0123-03-4
Circuit Court No. CF010186

Commonwealth of Virginia, Appellee.

From the Circuit Court of the
City of Alexandria

Before Judge McClanahan

This petition for appeal has been reviewed pursuant to Code § 17.1-407(C) and is denied for the following reason:

An Alexandria jury convicted appellant of rape, forcible sodomy, abduction with the intent to defile, and assault and battery. On appeal from these convictions, appellant contended the trial court erred in refusing to conduct a post-verdict evidentiary hearing and failing to order a new trial based upon juror misconduct. This Court found the following facts:

> After the trial judge dismissed the jurors at the end of the trial, Evans's counsel asked for a bench conference. Following the conference, the trial judge questioned a juror [Mose Haley,] and asked if he "overheard or discussed anything with anybody during the trial." The juror said he had "[n]ever discussed the case with anyone." He recalled that a man said he was there for a trial

and that he asked the man which trial. The juror said he immediately walked away when the man said the Evans trial.

Weeks later, but before the sentencing hearing, Evans's counsel filed a motion for a new trial, alleging juror misconduct. Attached to the motion is a document, which is styled "affidavit" and which recites, in pertinent part, as follows:

> 1. On the second day of the trial, June 26, 2001, I was in front of the Courthouse during the lunch recess. I was a[proached by a well-dressed, bald, African-American man who began to speak to me.
>
> 2. I do not remember the exact words he said, but the substance of his statements were as follows:
>
> A. He was there to watch the trial of his nephew.
>
> B. He hoped they gave his nephew forty years.
>
> C. His nephew "thinks he's slick."
>
> D. He was only coming to the trial to support his sister-in-law.
>
> E. His nephew was always in trouble.
>
> F. His nephew had been in this kind of trouble before.

3. I asked the man which trial he was talking about and he said "Roland Evans."

4. When I realized he was talking about Roland Evans, I ended the conversation.

5. I did not realize he was speaking about Roland Evans until he specifically mentioned that he was speaking about Roland Evans.

6. I did not ask him any questions or continue speaking with him once I realized he had been speaking about Roland Evans.

[Haley's]... signature is below the words, "I swear or affirm that the above statements are true to the best of my recollection." An investigator for the Public Defender's Office, C.S. Nelson, signed the document next to the words "witnessed by."

The prosecutor filed a response to the motion and attached to it a document from . . . [Haley]. This document is also styled, "affidavit," and recites, in pertinent part, the following:

1. After the trial, on two occasions, a man named Clarence Nelson came to see me. From what he said to me, I assumed he was with the Commonwealth Attorney's office.

2. I told him about the man who talked to me outside of the Courthouse.

3. That man told me that someone related to him was on trial, but I don't remember the

exact relation. I seem to recall that it was his nephew or cousin, or a similar relation.

4. That man told me that he was there to support his wife.

5. When the man told me that he was there about the Evans case, I walked away.

6. That man did not say anything about the relative being in trouble before. He also did not say anything about him being in that kind of trouble before.

7. I did not notice those statements on the paper Clarence Nelson had, or I would not have signed it. I did not read his paper carefully. I did not tell him what to put in that paper, he had it written before he came to see me.

8. I did not receive any information that could have or that did affect my opinion about the case.

The juror's signature follows the words, "I swear the above statements are true." A detective signed next to the words, "witnessed by."

The trial judge denied Evans's request for an evidentiary hearing and heard arguments on the motion for a new trial. . . . The trial judge . . . accepted as a proffer of evidence a sworn, three-page affidavit from Nelson, which detailed the events surrounding the securing of the juror's

> statement that accompanied Evans's motion for a new trial, That affidavit contradicted in significant part two of the juror's other statements. The trial judge denied Evans's motion for a new trial.

Evans v. Commonwealth, 39 Va. App. 229, 233-35, 572 S.E.2d 481, 483-84 (2002). Concluding that the trial judge erred in refusing to conduct an evidentiary hearing to investigate the claim of juror misconduct, this Court reversed and remanded the case for an evidentiary hearing and "for a determination on proper evidence whether sufficient misconduct occurred to warrant the setting aside of the jury verdict 'and for such proceedings thereafter as may be necessary and proper.'" Id. at 240, 572 S.E.2d at 486 (citation omitted).

At the evidentiary hearing conducted upon remand of the case, Haley testified that, during the luncheon recess on the second day of trial, he was approached by a person later identified as Gaster Hunter. According to Haley, Hunter indicated he was there to support Hunter's "sister or somebody." Hunter said to Haley, " [H]e's slick, you should give him 40 years." When Haley asked what case Hunter was talking about, Hunter said "the Evans case," Haley immediately walked away.

Haley further testified that Hunter's comment did not affect Haley's opinion of appellant or Haley's decision as a juror. Haley did not repeat Hunter's comment to any other juror. Haley, denied telling Nelson, the investigator from the public defender's office, several facts contained in the "affidavit"

Nelson prepared for Haley to sign. Specifically, Haley denied telling Nelson that Hunger said he was speaking about Hunter's nephew, that Hunter said his nephew was always in trouble, and that Hunter said his nephew had been in "this kind of trouble before."

Ruth Kay, Bernard Murphy, and Clifford Sturdivant, Haley's fellow jurors, each testified that Haley did not repeat during deliberations any comment that was made to him outside the courtroom.

Gaster Hunter testified that he spoke to Haley outside the courtroom without knowing that Haley was one of the jurors at appellant's trial. Hunter told Haley he was there to be supportive of Jill Brown, who was Hunter's girlfriend, appellant's aunt, and a witness at the trial. Hunter commented that young people are always getting into trouble and that appellant had been in trouble before involving women, alcohol, and drugs. Hunter said appellant would not be able to beat the charge and would receive a sentence of twenty or thirty years. Haley asked who was Hunter's nephew. Hunter said, "Roland Evans." Subsequently, after witnessing a portion of appellant's trial, Hunter recognized Haley as one of the jurors and reported his prior contact with. Haley.

Nelson testified that he interviewed Haley after the verdict was returned. According to Kelson, Haley said the man outside the courtroom had told him appellant always was in trouble and had been in'this kind of trouble before. The trial judge also

admitted into evidence the documents entitled "affidavit" as described above.

The trial judge ruled that the only information Hunter imparted to Haley was that appellant was "slick" and that Hunter hoped he got a long sentence. The judge specifically rejected testimony that Hunter mentioned to Haley that appellant previously had been in trouble of the same kind. The judge concluded that the statements made to Haley, which no other jurors heard, did not prejudice Haley as a juror and did not require a new trial.

"The credibility of the witnesses and the weight accorded the evidence are matters solely for the fact finder who has the opportunity to see and hear that evidence as it is presented." Sandoval v. Commonwealth, 20 Va. App. 133, 138, 455 S.E.2d 730, 732 (1995). We accept on appeal the trial judge's credibility determination that Haley's evidentiary hearing testimony accurately described his interaction with Hunter.

In Virginia,

> "the mere fact of juror misconduct does not automatically entitle either litigant to a mistrial." "Instead, the trial court, in the exercise of sound discretion, must determine whether such misconduct probably resulted in prejudice. And the burden of establishing that probability is upon the party moving for a mistrial." A trial court's decision that a juror can be fair and impartial is entitled to great weight *on* review.

Jenkins v. Commonwealth, 22 Va. App. 508, 515, 471 S.E.2d 785, 789 (1996) (en banc) (citations omitted), rev'd *on* other grounds, 254 Va. 333, 492 S.E.2d 131 (1997).

Hunter did not provide Haley with information not introduced into evidence at trial. Nor did Hunter comment upon the evidence against appellant. Moreover, neither Haley nor the other jurors were affected in deliberations by Haley's encounter with Hunter.

Considering all the facts and circumstances, the trial judge did not abuse his discretion in denying appellant's motion for a new trial based upon juror misconduct.

This order is final for purposes of appeal unless, within fourteen, days from the date of this order, there are further proceedings pursuant to Code § 17.1-407 (D) and Rule 5A:15(a) . If appellant files a demand for consideration by a three-judge-panel, the demand should include a statement, not to exceed one typewritten page, identifying how this order is in error.

This Court's records reflect that James C. Clark, Esquire, is counsel of record for appellant in this matter.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: /s/
Deputy Clerk

COURT OF APPEALS OF VIRGINIA

Present: Chief Judge Fitzpatrick, Judge Benton and Senior Judge Overton

Argued at Alexandria, Virginia

ROLAND ANTHONY EVANS

v. Record No. 2893-01-4

COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE JAMES W. BENTON, JR.
NOVEMBER 26, 2002

FROM THE CIRCUIT COURT OF
THE CITY OF ALEXANDRIA

Walter J. Ford, Judge Designate

James C. Clark (Land, Clark, Carroll, Mendelson & Blair, P.C., on brief), for appellant.

Richard B. Smith, Senior Assistant Attorney General (Jerry W. Kilgore, Attorney General, on brief), for appellee.

Roland Evans contends the trial judge erred in sustaining the Commonwealth's objection to a witness' testimony and by denying Evans's motion for an evidentiary hearing to investigate juror misconduct. Because the record does not contain a proffer of the witness' expected testimony, we cannot determine whether the judge erred in sustaining the objection to the testimony. In addition, we hold the trial judge made a premature credibility finding on

the issue of juror misconduct. We, therefore, reverse the trial judge's decision on the motion and remand for an evidentiary hearing.

I.

The evidence at trial proved that in the Fall of 2000, Evans met a woman, named Williams, at the barber shop where he worked and where she received hair cuts. After Evans and Williams developed a friendship, they had meals together, watched movies and television together, and smoked marijuana together. On three occasions, Evans spent the night on a sofa in Williams's apartment. Williams, however, denies ever having consensual sex or using cocaine with Evans.

Williams testified that on December 27, 2000, Evans came to her home unannounced after 10:00 p.m. Although Williams had already retired for the evening and initially ignored the knocking at her door, she eventually admitted Evans to her apartment. While they sat on the sofa and talked, Williams noticed that Evans had been drinking alcohol and told him to leave. When Evans was reluctant, Williams opened the door and insisted that he leave. Evans then grabbed her by the throat, closed the door, wrestled her, and hit her. Williams testified that she screamed and knocked over things in the room, hoping someone would hear her. The person who lives in the apartment below Williams testified that she heard noises indicating a fight was occurring in Williams's apartment between 11:00 p.m. and 3:00 a.m.

When Williams realized she was getting nowhere by struggling, she begged Evans to stop the assault and said, "you can do anything you want to do to me, just don't hit me [any] more." Williams testified that Evans raped her on the sofa and then forced her into the bedroom, where he sodomized her and raped her again. She testified that the assault stopped only when Evans became sick. After Evans vomited and fell asleep, Williams left her apartment wearing only a shirt and asked the apartment's attendant to call the police. The police arrived at 4:30 a.m. and found Evans sleeping on Williams's bed and arrested him.

Evans had a different account of the events. He testified that he and Williams had consensual intercourse that night. He said fighting occurred only after Williams refused to pay him for cocaine he earlier had obtained for her. Evans testified that he became angry and threatened to take Williams's car. When Williams fought him for the car keys, she suffered injuries and items in her apartment were broken during this struggle.

At the conclusion of the evidence, the jury convicted Evans for rape, forcible sodomy, abduction with intent to defile, and assault and battery. After the trial judge dismissed the jurors at the end of the trial, Evans's counsel asked for a bench conference. Following the conference, the trial judge questioned a juror and asked if he "overheard or discussed anything with anybody during the trial." The juror said he had "[n]ever discussed the case with anyone." He recalled that a man said he was there for a trial and that he asked the man which trial. The juror

said he immediately walked away when the man said the Evans trial.

Weeks later, but before the sentencing hearing, Evans's counsel filed a motion for a new trial, alleging juror misconduct. Attached to the motion is a document, which is styled "affidavit" and which recites, in pertinent part, as follows:

> 1. On the second day of the trial, June 26, 2001, I was in front of the Courthouse during the lunch recess. I was approached by a well-dressed, bald, African-American man who began to speak to me.
>
> 2. I do not remember the exact words he said, but the substance of his statements were as follows:
>
> A. He was there to watch the trial of his nephew.
>
> B. He hoped they gave his nephew forty years.
>
> C. His nephew "thinks he's slick."
>
> D. He was only coming to the trial to support his sister-in-law.
>
> E. His nephew was always in trouble.
>
> F. His nephew had been in this kind of trouble before.
>
> 3. I asked the man which trial he was talking about and he said "Roland Evans."

4. When I realized he was talking about Roland Evans, I ended the conversation.

5. I did not realize he was speaking about Roland Evans until he specifically mentioned that he was speaking about Roland Evans.

6. I did not ask him any questions or continue speaking with him once I realized he had been speaking about Roland Evans.

The juror's signature is below the words, "I swear or affirm that the above statements are true to the best of my recollection." An investigator for the Public Defender's Office, C.E. Nelson, signed the document next to the words "witnessed by."

The prosecutor filed a response to the motion and attached to it a document from the same juror. This document is also styled, "affidavit," and recites, in pertinent part, the following:

1. After the trial, on two occasions, a man named Clarence Nelson came to see me. From what he said to me, I assumed he was with the Commonwealth Attorney's office.

2. I told him about the man who talked to me outside of the Courthouse.

3. That man told me that someone related to him was on trial, but I don't remember the exact relation. I seem to recall that it was his nephew or cousin, or a similar relation.

4. That man told me that he was there to support his wife.

5. When the man told me that he was there about the Evans case, I walked away.

6. That man did not say anything about the relative being in trouble before. He also did not say anything about him being in that kind of trouble before.

7. I did not notice those statements on the paper Clarence Nelson had, or I would not have signed it. I did not read his paper carefully. I did not tell him what to put in that paper, he had it written before he came to see me.

8. I did not receive any information that could have or that did affect my opinion about the case.

The juror's signature follows the words, "I swear the above statements are true." A detective signed next to the words, "witnessed by."

The trial judge denied Evans's request for an evidentiary hearing and heard arguments on the motion for a new trial. Referring to the juror's oral statement at the conclusion of trial and the juror's statement attached to the Commonwealth's response, the trial judge said the juror's "first statement and his last statement were correct." The trial judge then said he "would accept those and find as a fact that there was no other conversation between [the juror and Evans's uncle]." Referring to the juror's statement which accompanied Evans's motion, the trial judge said even if "these facts are

correct," he would find them insufficient to grant the motion for a new trial. The trial judge also accepted as a proffer of evidence a sworn, three-page affidavit from Nelson, which detailed the events surrounding the securing of the juror's statement that accompanied Evans's motion for a new trial. That affidavit contradicted in significant part two of the juror's other statements. The trial judge denied Evans's motion for a new trial.

II.

Evans contends the trial judge erred in sustaining the Commonwealth's objection to Jill Brown's testimony at trial. The Commonwealth contends that Evans cannot challenge the trial judge's ruling because his counsel failed to make a proper proffer of the testimony excluded. We agree that the necessary proffer was not made.

Evans testified at trial that, a day and a half before the struggle in Williams's apartment, he and Brown were on a highway near Williams's apartment. As he approached an exit near the apartment, he asked for Brown's cellular phone to place a call because he had to "stop and get some money from somebody." He did not testify that he identified that person to Brown. Later, on direct examination, Brown testified that Evans had made a statement to her in the car as they neared that highway exit. When Evans's counsel asked Brown what Evans said, the prosecutor objected on the ground that Evans's statement was an inadmissible prior consistent statement. Evans's counsel responded that Brown's recitation of Evans's

statement was admissible under the state of mind exception. The trial judge sustained the prosecutor's objection.

"[W]hen testimony is rejected before it is delivered, an appellate court has no basis for adjudication unless the record reflects a proper proffer." Whittaker v. Commonwealth, 217 Va. 966, 968, 234 S.E.2d 79, 81 (1977). A proper proffer may consist of "a unilateral avowal of counsel, if unchallenged, or a mutual stipulation of the testimony expected." Id. at 969, 234 S.E.2d at 81. The purpose for the proffer "is to assure that the record will be complete." Lowery v. Commonwealth, 9 Va. App. 304, 308, 387 S.E.2d 508, 510 (1990). In the absence of an acquiescence or stipulation, we have held, in circumstances such as in this case, that we will not consider the error assigned to the rejection of the testimony unless it has been given in the absence of the jury and made a part of the record. Whittaker, 217 Va. at 969, 234 S.E.2d at 81.

Evans argues that we can expect Brown's testimony to mirror Evans's testimony. That, however, is a matter we cannot assume and is precisely why a proffer is required. Clearly, Evans's counsel's statement to the trial judge that "[Brown's testimony] goes to the state of mind" is not sufficient to proffer the substance of Brown's testimony; that statement was given in response to the adequacy of the Commonwealth's objection and was not an avowal of the substance of Brown's testimony. We hold, therefore, the record is insufficient to determine whether the trial judge erred in sustaining the prosecutor's objection.

III.

The rule is now well established that "private communications, possibly prejudicial, between jurors and third parties, are forbidden and invalidate the verdict unless their harmlessness is made to appear." Dozier v. Morrisette, 198 Va. 37, 40, 92 S.E.2d 366, 368 (1956). "In considering a motion to set aside when juror misconduct is alleged, the trial court has the affirmative duty 'to investigate the charges and to ascertain whether or not, as a matter of fact, the jury was guilty of such misconduct.'" Commercial Union Ins. Co. v. Moorefield, 231 Va. 260, 265, 343 S.E.2d 329, 332 (1986) (quoting Kearns v. Hall, 197 Va. 736, 743, 91 S.E.2d 648, 653 (1956)).

Although the Supreme Court has held that "hearsay affidavits are not admissible in support of a motion for a new trial," Moorefield, 231 Va. at 265, 343 S.E.2d at 333, the Court also has noted that, "[n]evertheless, such an affidavit may be sufficient to require the trial court to investigate the matters recited in the document." See also Evans-Smith v. Commonwealth, 5 Va. App. 188, 207, 361 S.E.2d 436, 447 (1987). In conducting such an investigation, the trial judge may summon jurors and persons knowledgeable of the events to be "sworn in open court and duly examined by the court and counsel as to what had transpired." Dozier, 198 Va. at 40, 92 S.E.2d at 368.

In deciding whether to order a new trial, the judge must be mindful of the following:

> A juror may not properly receive any information about a case he is hearing except in open court and in the manner provided by law. The reception of any evidence by the jury, especially in a criminal case, in addition to that produced at trial is ground for setting aside the verdict whenever there is sufficient ground to believe that . . . an accused in a criminal case, has been prejudiced by receipt of the information. And the test in a criminal case "is not whether the jurors were actually prejudiced by the extraneous matter, but whether they might have been so prejudiced. If they might have been prejudiced, then the purity of the verdict is open to serious doubt and the verdict should be set aside and a new trial awarded."

Brittle v. Commonwealth, 222 Va. 518, 522, 281 S.E.2d 889, 890 (1981) (citations omitted). Although "a motion for a new trial on the ground of juror misconduct is addressed to the sound discretion of the trial judge," Moorefield, 231 Va. at 265, 343 S.E.2d at 332, the Supreme Court long ago held that this principle must be applied "with the added caution that only slight evidence of influence or prejudice as a result of such misconduct of a juror should be required to warrant the granting of a new trial." Hickerson v. Burner, 186 Va. 66, 72, 41 S.E.2d 451, 454 (1947). Against the background of these principles, we must determine whether, as Evans contends, the trial judge erred in denying his motion for an evidentiary hearing to enable him to prove juror misconduct that would merit a new trial.

In denying Evans's motion, the trial judge relied upon three pieces of evidence: the juror's unsworn oral statement at the end of the trial concerning the event, the juror's written statement to Evans's investigator that suggests the occurrence of improper communication, and the juror's further written statement to the detective that contradicts in part his previous written statement. We note that neither of the two written statements from the juror was an "affidavit," as that term is commonly used. An affidavit is a declaration in writing made by a person under oath and administered before a person authorized by law. Farm Bureau Mut. Ins. Co. v. Hammer, 83 F. Supp. 383, 385 (W.D. Va.), rev'd on other grounds sub nom. Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793 (4th Cir. 1949). See also Huff v. Commonwealth, 213 Va. 710, 711-12, 194 S.E.2d 690, 692 (1973); Hawkins v. Gibson, 28 Va. (1 Leigh) 476, 480 (1829); Code § 49-4 and § 49-5; Black's Law Dictionary 58 (7th ed. 1999). Furthermore, the record indicates that Nelson's three-page affidavit was proffered as an exhibit, was sworn, and contains a detailed narrative of his meeting with the juror, which contradicts parts of the statement the juror gave the detective. After hearing oral argument by counsel, the trial judge ruled that "the statements submitted by [Evans's counsel] were incorrect." The trial judge also ruled, however, that even if Evans's allegation of misconduct was correct, he would still find the conduct insufficient as to require a new trial.

Initially, we hold that the case decisions are contrary to the trial judge's alternative ruling that, even if the events occurred as Evans alleged, those

facts provide an insufficient basis for a new trial. A juror may not properly receive any information about a case he is hearing except in open court and in the manner provided by law. Brittle, 222 Va. at 522, 281 S.E.2d at 890. When a juror, "especially in a criminal case," receives extraneous evidence, that circumstance "is ground for setting aside the verdict whenever there is sufficient ground to believe that . . . an accused in a criminal case has been prejudiced by receipt of the information." Id.

Both of the juror's written statements revealed more facts than disclosed by the juror at the close of trial. One of the juror's statements indicates that Evans's uncle revealed to him inappropriate information about Evans. Specifically, that statement indicates the uncle said that Evans thinks he's slick, that Evans was always in trouble, that Evans has been in this kind of trouble before, and that he hoped the jury gave Evans forty years. If the juror's statement is correct, then the juror received information about matters not evidence in the trial and not properly introduced in an open court. This information is highly prejudicial to Evans because it suggests that Evans is someone capable of committing the crimes charged, that he has the propensity to commit these types of crimes, and that Evans's own uncle thought he was guilty. At the very least, a verdict under these circumstances is open to doubts. See Thompson v. Commonwealth, 193 Va. 704, 715, 70 S.E.2d 284, 290 (1952).

We further hold that the trial judge failed to satisfy his affirmative duty to adequately investigate the juror misconduct allegation when he denied

Evans's motion for a new trial without first conducting an evidentiary hearing. When the trial judge questioned the juror at the end of the trial, he asked the juror whether the juror "overheard anything or discussed anything with anybody." The juror's response was a brief denial of any contact of substance with the man. When the juror's written statements were later presented to the trial judge, the nature of the contact, however, was disclosed to be different. Because the two written statements conflict with each other and also with the juror's oral statement, the trial judge was no longer investigating a naked allegation of juror misconduct. He had a basis to believe several conflicting sets of facts eminated from this juror, one of which supported the misconduct allegation. In addition, the trial judge had a proffer in the form of an affidavit from an investigator attesting to the circumstances surrounding the statement the juror gave him and contradicting, in part, one of the juror's statements.

We do not know from competent evidence in the record what actually transpired. But the trial judge should not have dismissed Evans's motion without first conducting an adequate investigation upon evidence properly presented at a hearing. The juror's statements and Nelson's affidavit were sufficient to warrant an evidentiary hearing. Therefore, we reverse and remand for an evidentiary hearing and for a determination on proper evidence whether sufficient misconduct occurred to warrant the setting aside of the jury verdict "and for such proceedings thereafter as may be necessary and proper." Kearns, 197 Va. at 745, 91 S.E.2d at 654.

Reversed and remanded.

VIRGINIA:

In the Court of Appeals of Virginia, on Tuesday the 26th day of November, 2002.

Ronald Anthony Evans, Appellant,

against Record No. 2893-01-4
Circuit Court No. CF010186

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Alexandria Before Chief Judge Fitzpatrick, Judge Benton and Senior Judge Overton

For reasons stated in writing and filed with the record, the Court is of opinion that the trial court erred in dismissing appellant's motion for an evidentiary hearing without first conducting an adequate investigation upon evidence properly presented at a hearing. Accordingly, the decision on the motion is reversed and annulled, and the case is hereby remanded to the trial[1] court for an evidentiary hearing and for a determination on proper evidence whether sufficient misconduct occurred to warrant the setting aside of the jury verdict and for any further proceedings necessary.

This order shall be certified to the trial court.
A Copy,
Teste:
Cynthia L. McCoy, Clerk

By: /s/
Deputy Clerk

[ENTERED: JANUARY 23, 2008]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-7438
(2:07-cv-00025-WDK)

ROLAND EVANS,
Petitioner – Appellant,

v.

GENE M. JOHNSON, Director of the Virginia Department of Corrections,
Respondent – Appellee.

ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Traxler, Judge Shedd, and Judge Duncan.

/s/Patricia S. Connor, Clerk

Exhibit #4

"AFFIDAVIT"

I HEARBY SWEAR AS TO THE FOLLOWING:

1. That my name is Jillinda Glenn residing at 436 N. Armistead St. #201, Alexandria, VA 22312.

2. That I have been employed at the U.S. Bankruptcy Court for the Eastern District of VA, 200 S. Washington St., Alexandria, VA 22314, for 16 years as a Case Manager.

3. That I am a former member of the Alexandria City Schools, Family Life Advisory Committee.

4. That I am the coordinator for the USBC for collecting/giving donations to the Alexandria on Women for Domestic Violence. In addition, I mentor young girls and teach sewing skills.

5. That my nephew Roland A. Evans was on trial in the Alexandria Circuit Court on June 25, 26, and 27, 2001.

6. That on the evening of June 26, 2001, I was informed by my boyfriend ("uncle" of Roland Evans) at the time, Gaster Hunter ("Gaster"), the he thought he did something wrong.

> a. He told me he arrived at the Alexandria Circuit Court and asked the bailiff which courtroom the Evans trial was being held in.

b. The bailiff said the Evans trial was in recess.

c. He stated that we went outside and waited in front of the courthouse for the Evans family members to return.

d. He stated that while waiting outside smoking a cigarette he struck up a conversation with an African American man wearing a baseball cap.

e. Gaster stated that when he went into the courtroom he noticed the gentleman he was speaking to sitting in the jurors' panel.

f. Gaster told me he said some things to the man that should not have been said, he was venting to the man how frustrated he was with having to be at the courthouse and how his nephew was always in trouble because of the drug use and his nephew (Evans) takes his family through hell and how negatively he felt toward Evans.

7. That I arrived at the courthouse the next morning 6/27/01, for the trial and when I saw Evans attorney, Christopher Leibig, Esquire, I told him everything that Gaster told me, which was that he spoke to a juror during recess the day before, and he said some things about Evans that he should not have said and now thought he might be in trouble.

8. That I assured Gaster that reporting the conversation with the juror to my nephew's attorney

was the correct thing to do and that he was not in trouble because he never knew he was talking to a juror until later when he went into the courtroom and saw him on the panel.

9. That on June 27, 2001, Christopher Leibig had asked me to repeat everything I told him to Assistant Commonwealth's Attorney, Jennifer Pollard, Esquire, and my nephew's prosecuting attorney, which I did on a recess while the jury was deliberating the "guilt" phase of the trial, before they reassembled and pronounced their verdict(s).
I honestly and affirmatively swear that the above statements are true to the best of my knowledge.

/s/ Jillinda Glenn

Subscribes and sworn to before me this date March 6, 2008.

Notary Public /s/ Maria King. Commonwealth of Virginia

My commission expires May 31, 2011. My id number is 7086755.

Exhibit #3

Affidavit of Clarence E. Nelson

I, Clarence E. Nelson, hereby swear and affirm as follows:

1. I am an investigator for the Office of The Public Defender in Alexandria, Va.

2. I have previously worked as a Police Officer and Detective Sergeant.

3. I have an Associates Degree in Criminal Justice, certificates of training in Burglary Investigation, Sex Crimes Investigation, Death Investigation, Criminal Investigation, and Evidence Photography.

4. I have worked as a Correctional Officer, An Administrative Staff Assistant to the Warden with duties as Investigating Officer of Inmate Grievances against inmates and staff.

5. I attended the trial of Roland Evans and witnessed the judge in the case question a juror, Mr. Mose Haley about a conversation he had with one of the family members of the defendant.

I was asked by Mr. Evans attorney to speak to Mr. Haley regarding the conversation he had with the family member.

On Friday, June 29, 2001, I went to the home of Mr. Mose Haley. I spoke with a woman who answered the door and asked to speak to Mr. Haley.

I identified myself with my I.D. and the woman identified herself as Mr. Haley's wife. She informed me that Mr. Haley wasn't at home and that he was working late. I asked her when would be the best time to see Mr. Haley and she informed me that Monday, July 2, 2001, around 4:00 p.m. would be the best time to see Mr. Haley. I gave Ms. Haley one of my business cards and informed her that I would be back the following Monday.

On Monday, July 2, 2001, I returned to the home of Mr. Haley at approximately 4:00 p.m. Mr. Haley answered the door. Identified myself to Mr. Haley and he informed me that he was expecting me. Mr. Haley invited me into his home and I sat on the couch in the living room. I informed Mr. Haley that I was there to talk to him about the trial that he was a juror on regarding Roland Evans.

I asked Mr. Haley about a conversation that he had with a man outside the Courthouse while he was a juror on the case. Mr. Haley began telling me bits and pieces of the conversation he had with the man. Mr. Haley stated that he was sitting on the courthouse steps eating his lunch when a well dressed black man with a bald head approached him and started a conversation with him. He stated that the man said "I hope they give him forty years, he thinks he's slick. Mr. Haley stated that the man said something about the man being in trouble before, or is always in trouble.

Mr. Haley stated that he didn't quite remember everything the man said, but Mr. Haley

kept repeating to me the fact that the man said that "he hoped they give him forty years".

Mr. Haley stated that he asked the man what case he was referring to, and the man stated Roland Evans. Mr. Haley stated that he didn't ask the man any other questions and did not discuss the case with him. During the interview with Mr. Haley I was taking notes and once Mr. Haley was finished I went over my notes with him to verify the things he had told me. I reported my conversation to Roland Evans attorney, Mr. Chris Leibig.

6. On Wednesday, July 11, 2001, intern Ms. Heidi Tseu and myself interviewed Mr. Gaster Hunter at the Community Health Center in Washington, D.C. This was the first meeting that I had with Mr. Hunter. Mr. Hunter advised me that he arrived at the Alexandria Courthouse approximately 12:30 on Wednesday, June 26, 2001. After checking the docket for the location, he arrived in the court room where there was no trial proceeding at that time. He spoke to a Sheriff Deputy and learned that they were out for recess. He stated that he went outside to wait for his wife.

Mr. Hunter stated that while he was waiting, he struck up a conversation with a black man that was also standing around. Mr. Hunter stated that he was frustrated about having to be at the courthouse and began talking to the man. He stated that was venting and began making comments about the defendant to the man. Mr. Hunter stated that he doesn't remember everything he said to the man, but does remember some specific comment that he

made. He stated that he said "this boy takes his family through hell, he always thinks he's beating the system, it's always about drugs and woman, messing around with those women [drug using etc..], and it'll teach him a lesson if he gets 30-35 years".

Mr. Hunter stated that the man asked him "What's your nephew's name" Mr. Hunter responded "Evans". The man said Oh O.K. Mr. Hunter stated that he spotted an acquaintance and left.

Mr. Hunter stated that after returning to the courtroom, he recognized a juror as the man he had the conversation with outside in the courtyard. Mr. Hunter stated that he was uncertain about what to do, but ended up telling his wife the next day I also reported this interview with Mr. Leibig.

7. On Friday, July 13, 2001, I was given a typed Affidavit by Mr. Liebig with the information I had given him regarding my interview with Mr. Haley. I reviewed the Affidavit and found that it was an accurate account of the interview I had with Mr. Haley. I took this Affidavit to the home of Mr. Haley that same afternoon. Mr. Haley answered the door to his home and again I identified myself and he invited me in.

I informed Mr. Haley that I had a typed Affidavit with the information he had discussed with me on July 2, 2001. I handed it to him and asked him to read it. Mr. Haley took the Affidavit and read it. Once he finished, I asked him if what he read was an accurate account of the conversation, and he informed me that it was. At this time I asked Mr.

Haley would he sign the Affidavit and he stated that he would and he did. I took the Affidavit and signed it as a witness. This Affidavit was returned to Mr. Leibig.

8. On Friday, July 20, 2001, I was given another Affidavit by Mr. Leibig with the information I had given him regarding the interview I had with Mr. Gaster Hunter. I reviewed the Affidavit and found that it was an accurate account of the interview that Intern Heidi Tseu and myself had with Mr. Hunter. I took this Affidavit to Mr. Hunter and asked him to read it to determine if it was an accurate account of the interview we had on July 11, 2001.

Mr. Hunter read the Affidavit and noticed that there were a couple of errors on the Affidavit. He stated that his name was not Gaston, but Gaster. He stated that he was not the husband, but the fiancée of Roland Evans aunt. He also stated that Roland Evans aunt's name was Jillanda and not Jolinda. I asked Mr. Hunter to make the corrections on the Affidavit and initial the corrections and he did. I returned the Affidavit to Mr. Leibig.

/s/ Clarence E. Nelson Date 10-19-01

Subscribed and sworn before me this 19th Day of October, 2001.

/s/ Melinda Douglas, Notary

My Commission expires March 31, 2005

Exhibit #2

VIRGINIA

IN THE CIRCUIT COURT FOR
THE CITY OF ALEXANDRIA

COMMONWEALTH OF VIRGINIA

V. CASE NO. CF01-0186

ROLAND EVANS,

AFFIDAVIT

I, Gaster Hunter, hereby declare as follows:

1. I am the fiancée of Jillanda Glenn, the aunt of Roland Anthony Evans.

2. On June 26, 2001, I arrived at the Courthouse on King Street in Alexandria at about 12:30 p.m. to watch the case of Commonwealth v. Roland Anthony Evans.

3. I asked a sheriff's deputy about the location of the trial, and was told that court was recessed for lunch.

4. I was waiting in front of the Courthouse when I struck up a conversation with an African-American man wearing a cap.

5. I mentioned my frustration about having to be at the Courthouse that day. I do not remember the exact statements I made to the man. The substance of what I said to him is listed below:

A. I was there to see the trial of my nephew.

B. My nephew takes his family through hell.

C. My nephew always think's he's beating the system.

D. With my nephew, it's always drugs and women.

E. It will teach my nephew a lesson if he gets 30-35 years.

F. My nephew has been in this kind of trouble before.

6. Later, when I entered the Courtroom and the trial resumed, I saw the man I had spoken to sitting on the jury.

7. When I spoke to the man, I had no idea the man was a member of the jury.

8. I was uncertain about how to handle the matter, but I told my wife everything one or two days later.

I swear or affirm that the above statements are true to the best of my recollection:

/s/ Gaster Hunter Date: 7/20/01

Witnessed by /s/ C.E. Nelson Date: 7/20/01

Office of
PUBLIC DEFENDER
132 N. ROYAL ST., SUITE 200
ALEXANDRIA, VA 22314

Exhibit #1

VIRGINIA

IN THE CIRCUIT COURT FOR
THE CITY OF ALEXANDRIA

COMMONWEALTH OF VIRGINIA,

V. CASE NO. CF01-0186

ROLAND EVANS,
Defendant.

AFFIDAVIT

I, Mose Haley, hereby declare as follows:

1. I was a juror in the case of Commonwealth v. Roland Anthony Evans, a case heard in the Circuit Court for the City of Alexandria from June 25 to June 27, 2001.

2. I live at 139 Lynhaven drive in Alexandria, VA.

3. On the second day of the trial, June 26, 2001, I was in front of the Courthouse during the lunch recess. I was approached by a well-dressed, bald, African-American man who began to speak to me.

4. I do not remember the exact words he said, but the substance of his statements were as follows:

A. He was there to watch the trial of his nephew.

B. He hoped they gave his nephew forty years.

C. His nephew "thinks he's slick".

D. He was only coming to the trial to support his sister-in-law.

E. His nephew was always in trouble.

F. His nephew had been in this kind of trouble before.

5. I asked the man which trial he was talking about and he said "Roland Evans."

6. When I realized he was talking about Roland Evans, I ended the conversation.

7. I did not know the man was speaking about Roland Evans until he specifically mentioned that he was speaking about Roland Evans.

8. I did not ask him any questions or continue speaking with him once I realized he had been speaking about Roland Evans.

I swear or affirm that the above statements are true to the best of my recollection:

/s/ Mose Haley
Date: 7/13/01

Witnessed by /s/ C.E. Nelson
Date: 7/13/01

Office of
PUBLIC DEFENDER
132 N. ROYAL ST., SUITE 200
ALEXANDRIA, VA 22314

Exhibit #5

Interim/Final Report of Investigation

Case name: Commonwealth v. Tony Evans

Assigning attorney: Chris

Date assignment received:

Interim report: Final Report:

Result of Assignment: On Wednesday 07-11-01, Nelson and I met Mr.Gaston Hunter at the Community Medical Center in Washington D.C. at approximately 2:00 p.m.

Mr. Hunter states that he left from a business meeting on Tuesday 06-26-01, and arrived at roughly 12:30 p.m. at the Alexandria Courthouse. After checking the docket for the location, he arrived in the courtroom where there was no trial proceeding at that time. After asking the sheriff, he learned that they were out for recess. He returned back downstairs to the entrance and left the building. His wife works at the Bankruptcy court nearby, so he was standing outside to meet her.

Mr. Hunter was leaning against the archway in the front courtyard of the courthouse 'killing time'. At this point, a black man came walking by the railing, wearing a cap. They struck up a conversation about the weather. Mr. Hunter stated that he was frustrated about having to be there in

there in the first place and began to talk about Tony Evans. He mostly rambled, but some specific comments that he can recall included.

- This boy takes his family through hell.
- He always thinks he's beating the system.
- It's always drugs and women.
- Messing' around with those women [drug using etc..].
- It'll teach him a lesson if he gets 30-35 years.

The man then asked 'What's your nephew's name?' Mr. Hunter responded 'Evans' The man said 'Oh, ok'. Both men were then distracted by a woman walking by and Mr. Hunter left when he spotted an acquaintance.

After returning to the courtroom, Mr. Hunter then recognized a juror as the man that he had spoken with, except he had removed his cap. After recognizing him, Mr. Hunter was uncertain how to proceed but ended up telling his wife everything, one or two days later.

Mr. Hunter states that he did not see the jury before meeting and talking with the man. Mr. Hunter did not approach the man and the man was just walking around. Mr. Hunter had assumed he was just someone who frequented the courthouse.

Submitted by: /s/ Heidi Tseu

Respectfully submitted,

Gail A. Ball, Esquire
VSB #47681
Ball Legal Firm, P.C.
740 Duke Street, Suite 450
Norfolk, Virginia 23510
757-625-2750 telephone
757-625-2740 facsimile

R. Wayne Nunnally, Esquire
VSB #12653
R. Wayne Nunnally, P.C.
740 Duke Street, Suite 450
Norfolk, Virginia 23510
757-625-5000 (Telephone)
757-625-6418 (Facsimile)